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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 552

J. LEE RANKIN, Corporation Counsel of The City of New York, on behalf of The Board of Education of The City of New York,

Appellee,

—against—

ALBERT SHANKER, and Others, etc.,

Defendants,

ALBERT SHANKER, individually and as President of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO and UNITED FEDERATION OF TEACHERS, LOCAL 2, AMERICAN FEDERATION OF TEACHERS, AFL-CIO.

Appellants.

JURISDICTIONAL STATEMENT

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Appellants.

JURISDICTIONAL STATEMENT

Appellants appeal from the final judgment of the New York Court of Appeals, dated June 5, 1969, which affirmed the order of the Appellate Division of the Supreme Court, First Judicial Department, entered on March 31, 1969, which affirmed the order and mandate of the Supreme Court of the State of New York, County of New York, entered on February 6, 1969, adjudging the appellants guilty of criminal contempt and sentencing the individual appellant to a jail term and a fine and the union appellant to a fine.

Opinions Below

The final decision of the New York Court of Appeals is not yet reported. The intermediate decision and the opinions of the New York Court of Appeals are reported at 23 N.Y. 2d 111, 295 N.Y.S. 2d 625, 242 N.E. 2d 802. The Appellate Division of the Supreme Court affirmed both the intermediate order and the final order and mandate of the Supreme Court of New York without opinion. The orders of affirmance are reported at 30 A.D. 2d 956, 294 N.Y.S. 2d 680, and 31 A.D. 2d 1010, 299 N.Y.S. 2d 371. The intermediate order and final order and mandate of the Supreme Court of New York are not reported. The intermediate and final opinions of the New York Court of Appeals and of the Supreme Court of New York are set forth in the Appendices A-D, *infra*, pp. 1a, 3a, 31a, 55a.

Jurisdiction

The proceeding on appeal is one to determine the guilt or innocence of appellants on a charge of criminal contempt and, if guilty, to impose a sentence. The proceeding was brought pursuant to the Judiciary Law of the State of New York and, more particularly as set forth in the order to show cause which initiated the proceeding, "Sec. 750 et seq." of said Judiciary Law.

The appellants moved for a trial by jury as provided in Section 753-a of the Judiciary Law and Section 808 of the Labor Law of the State of New York prior to the commencement of the trial. The motion was denied by construing those statutes to exclude appellants from their ambit and an immediate appeal was taken pursuant to a

provision permitting appeals from intermediate orders affecting substantial rights. The order was affirmed and an appeal was taken to the New York Court of Appeals with the permission of the Appellate Division of the Supreme Court to appeal an intermediate order. The New York Court of Appeals on October 30, 1968 affirmed by a vote of 4-3, three opinions being written. An application for a stay of the trial pending an appeal to this Court was denied (393 U.S. 930).

A trial without a jury was thereafter held and the appellants were found guilty of criminal contempt. The order on that finding was appealed on the sole question of appellants' right to a trial by jury.

The judgment sought to be reviewed is dated June 5, 1969 and was entered on the same date. Notice of appeal was filed in the Supreme Court of New York, County of New York, on August 28, 1969.

Jurisdiction of this Court to review the decision below by direct appeal is conferred by 28 U.S.C. Sec. 1257(2). The following cases are believed to sustain jurisdiction: *Puentes* v. *Board of Education of Union Free School District No. 21, Town of Bethpage, Nassau County, New York*, 392 U.S. 653 (1968), *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952), *Winters* v. *People of State of N. Y.*, 333 U.S. 507 (1948).

Statutes Involved

Section 753-a of the Judiciary Law of the State of New York, 29 McKinney's Consolidated Laws of New York at page 207 (App. E, p. 63a).

Section 808 of the Labor Law of the State of New York, 30 McKinney's Consolidated Laws of New York at page 416 (App. F, p. 65a).

Questions Presented

Appellants, a union which represents public and private employees and its president, were found guilty of criminal contempt for wilfully disobeying a court order enjoining them, *inter alia*, from engaging in a strike against the Board of Education of the City of New York and from picketing.

Appellants sought a trial by jury under State statutes which provide that "no person shall be punished by fine or imprisonment for any alleged contempt arising out of any failure or refusal to obey any mandate of the court contained in or incidental to an injunction order granted by said court in any case involving or growing out of a labor dispute except after a trial by jury to which the defendant shall be entitled as a matter of right . . . " The New York Court of Appeals, by a vote of 4-3, construed the statutes so as to exclude public employees and public employee unions from their coverage.

The questions presented are: (1) whether the construction of the New York statutes by the Court of Appeals of the State of New York deprives appellants of the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States in that such construction results in denying them, because they are a public employee union and officer, the right to a jury trial in a criminal contempt proceeding arising out of a labor dispute, while granting such right to all non-public employee unions and officers; and

(2) whether the construction of the New York statutes by the Court of Appeals of the State of New York denying a trial by jury to appellants in a criminal contempt proceeding results in a deprivation of liberty and property without due process of law as guaranteed by the 14th Amendment to the Constitution of the United States because such statutes as so construed are overbroad and not limited to the area of permissible application.

Statement of the Case

Appellant United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (UFT) is a union representing teachers in public and private schools. Appellant Albert Shanker (Shanker) is its president. Appellee, Corporation Counsel of the City of New York, initiated a proceeding to find appellants guilty of and to punish them for criminal contempt for wilful disobedience to a court order enjoining them, *inter alia*, from striking the Board of Education of the City of New York and from picketing.

The appellants were found guilty after a trial without a jury. The UFT was fined $220,000. Shanker was ordered imprisoned for 15 days and fined $250. All fines have been automatically stayed pursuant to statute pending the determination of this appeal. The jail sentence has been stayed pursuant to court orders pending the determination of this appeal.

Appellants moved for a trial by jury in the court of first instance prior to the commencement of the trial. They asserted their rights by motion at the outset, and in each appellate court, under the 6th and 14th Amendments to

the Constitution of the United States including their right to the equal protection of the laws (T 519, 523, 526-527, 536).[1]

The government made no secret of its reason for seeking to deny a trial by jury to the appellants. On October 29, 1968, in his argument before the Court of Appeals of the State of New York, the Corporation Counsel baldly asserted:

> "In the present situation it would be hard to get a jury to agree on anything."

It is conceded that these very same appellants would have the right to a trial by jury under Section 753-a of the Judiciary Law or Section 808 of the Labor Law in a contempt proceeding for an alleged wilful disobedience to a court order enjoining them from striking and picketing if the employees whom they represented in the particular labor dispute were employed by a private rather than a public school system.

The New York Court of Appeals in the final judgment appealed from relied on its earlier intermediate decision in which it remanded the case for trial without a jury.

The majority wrote: "Contrary to the defendants' contention, to refuse a trial by jury to public employees or their representative organizations and to grant it to those in private industry does not violate the equal protection of the laws under the Constitution of either the United States or New York State" (App. C, p. 36a).

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[1] The symbol "T" refers to the pagination contained in the excerpt from the transcript of the trial court proceedings which is part of the certified record herein.

The majority further wrote: "Strikes by employees in certain private industries may, as Judge Keating noted in dissent (Opn., p. 134), be just as paralyzing in their impact upon the public as strikes by workers in public employment. But the Legislature has not seen fit to legislate with regard to such strikes" (App. C, p. 38a).

Judge Burke in a dissent in which two other judges concurred wrote: "The issue is of constitutional dimension . . ." (App. C, p. 47a); and further wrote that there was a "serious constitutional deprivation of equal protection involved in the majority's construction of these statutes . . ." (App. C, p. 51a).

Judge Keating in a dissent in which two other judges concurred, wrote about both the undercoverage and overbreadth of the statutes as construed noting that they fail to cover private employees who "carrying out activities vital to the life and safety of the city may demand a trial by jury" (App. C, p. 54a), while denying a trial by jury to all public employees whether or not their job is vital to the public weal.

The Questions Are Substantial

1. This appeal brings to the Court a matter of fundamental constitutional law with important ramifications for the Nation's jurisprudence.

It applies to that growing segment of our population which works for one or another of our governmental bodies.[2] It applies directly to those governmental bodies.

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[2] Between 1962 and 1968 state and local government employment rose from 6½ million to more than 9,500,000. By mid-1968 Federal employment had increased to 2¾ million. U. S. Department of Labor, Monthly Labor Review, January 1969, p. 104; U. S. Department of Labor, Employment and Earnings Statistics for the United States, 1909-1968, Bull. No. 1312-6 pp. 824, 825.

Moreover, on the specific questions presented, whether the statutes as construed are constitutional, at least 16 states have similar statutes, all patterned on the legislation proposed by Mr. Justice (then Professor) Felix Frankfurter and Nathan Greene in their seminal book, *The Labor Injunction*, MacMillan Co., 1930,[3] except for the Minnesota statute which is patterned after the Clayton Anti-Trust Act, 38 Stat. 738 (1914), now 18 USC Rule 42.

States have held, contrary to the decision on appeal, that public employee unions have the right to a trial by jury in criminal contempt proceedings. *Dade County Classroom Teachers Association, Inc.* v. *Rubin, etc., et al.* (Fla. Sup. Court), 70 LRRM 2235 (Dec. 10, 1968).

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[3] Hawaii, S.B. 545, L. 1963, Sec. 11; Idaho, L. 1933, Ch. 215, Sec. 44-710; Indiana, L. 1933, Sec. 40-511; Louisiana, Acts 1934, No. 203, 23:848; Maine, Ch. 107, Sec. 37; Maryland, Annotated Code, 1939, L. 1935, Ch. 374, Sec. 72; Massachusetts, L. 1935, Ch. 407, Sec. 5; Minnesota, L. 1917, Ch. 493, Sec. 185.16; New Jersey, L. 1941, c. 15, Art. 8, Sec. 2A:15-56; North Dakota, L. 1935, Ch. 247, Sec. 34-0811; Oregon Revised Statutes, Ch. 662, Sec. 662.130; Purdon's Pennsylvania Statutes Annotated, Title 17, Chapter 20, Sec. 2047 and Title 43, Secs. 206a-206r; Rhode Island, P.L. 1951, Ch. 2748, Sec. 6, amending Ch. 299, as previously amended by Ch. 2359, P.L. 1936 and by Ch. 2619, P.L. 1938; Utah, L. 1933, Sec. 34-19-9, amended by S.B. 30, L. 1969; Washington, L. 1933, Ch. 7, Sec. 49.32.090; Wisconsin, L. 1931, Sec. 103.60.

The Federal Norris-LaGuardia Act, 29 U.S.C. Secs. 101-115 and 18 U.S.C. Sec. 3692 (formerly 29 U.S.C. Sec. 111) was also patterned after the Frankfurter-Landis proposal.

In this connection it is noted that the majority cited as authority for its construction of New York State's statutes the decision of this Court in *U. S.* v. *United Mine Workers of America*, 330 U.S. 258 (1947). That case is obviously distinguishable in that (1) this Court relied upon the specific limiting language in the jury trial provision of the Federal law which is absent from the state statutes, (2) this Court was able to refer to a legislative history which does not exist with respect to the New York statutes, (3) the equal protection of the laws issue was never presented to this Court, (4) because an advisory jury was waived, and (5) because since the decision in *Mine Workers, supra*, this Court has given added recognition to the importance of a trial by jury in a criminal contempt proceeding.

The instant case falls within an area of the law which this Court is currently in the process of mapping on a case by case basis, namely: the rights and obligations of public employees and the correlative rights and responsibilities of public employers.

The imperative need for the continuation of this process is evident both from the standpoint of the interests of governmental bodies and of their more than 12,000,000 employees and the families of those employees. Such need was recently recognized by a court in the case of *Olson* v. *University of Minnesota,* U.S.D.C., Dist. of Minn., Fifth Div., Docket No. 5-69 Civ. 28 (unreported), which, in ordering the reinstatement of a university employee for failure of the university to follow procedural due process in its dismissal, quoted from Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1461, 1462 (1968). That article, in part, reads at those pages:

> "With the increasing size of government as an economic unit, moreover, it is simply no longer true that a particular infringement related to employment by government is no greater than a particular infringement made by a private employer. . . .
>
> "If, under a functional analysis, the conclusion reached by Justice Holmes in 1892 is no longer viable, then Holmes' own methodology should be used to label an individual's interest in his public status a 'right' directly protected against unreasonable regulation. Such unreasonableness need involve only the lack of a sufficient connection with an adequately compelling public interest to warrant subordinating the individual interest under the circumstances."

This last statement is precisely what the dissenters found to be the situation in this case.

This Court, by its recent actions, has demonstrated its awareness of our Nation's need for added clarity in the area of the judicial rights of governments and their employees, repeatedly holding that acceptance of government employment does not entail the loss of legal rights.

Gardner v. *Broderick*, 392 U.S. 273 (1968);
Pickering v. *Board of Education*, 391 U.S. 563 (1968);
Garrity v. *New Jersey*, 385 U.S. 493 (1967);
Elfbrandt v. *Russell*, 384 U.S. 11 (1966);
Cramp v. *Board of Public Instruction of Orange County, Fla.*, 368 U.S. 278 (1961);
Shelton v. *Tucker*, 364 U.S. 479 (1960);
Slochower v. *Board of Higher Education*, 350 U.S. 551 (1956);
Wieman v. *Updegraff*, 344 U.S. 183 (1952).

The striving for equality before the law is based on man's natural sense of injustice. Cahn, *The Sense of Injustice*, 15 (1949). This Court in *Griffin* v. *Illinois*, 351 U.S. 12 (1956), traced the quest for equality before the law to the Magna Charta and in *Baxstrom* v. *Herold*, 383 U.S. 107 (1966), applied it to the right to a trial by jury.

This Court has specifically stated that public employees "are not relegated to a watered-down version of constitutional rights." *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967).

The issue of the equal right of a public employee with that of a private employee to a trial by jury is ripe for

consideration by this Court. The issue was presented in *DeLury* v. *City of New York*, —— U.S. ——, 89 S.Ct. 1224 (1969) but dismissed for want of a properly presented federal question. In that case, unlike this case, no demand for a trial by jury was made until after the trial court had rendered its decision. Public employees and public employee unions in other jurisdictions are currently appealing decisions denying them the right to a trial by jury in contempt cases arising out of alleged disobediences to court orders, although the constitutional issues raised in those cases are not identical to the issues presented on this appeal. E.g., *Board of Education of Kankakee School Dist. 111* v. *Kankakee Federation of Teachers, Local 886, AFT, AFL-CIO,* Docket No. 42506 now before the Ill. Sup. Ct. (no reported decision); *Junior College Board School Dist. No. 508* v. *Cook County College Teachers Union, Local No. 1600, AFT, AFL CIO, Norman Swenson, et al.*, Docket No. 52465, now pending in Ill. App. Ct. (no reported decision).

As the role of government in the lives of all the people grows, the importance of the caliber of the government employee likewise grows. Whether it be school teacher, social worker, nuclear physicist or drug analyst, it is important that governments be able to attract to their employ the best of our citizenry. To the extent that the acceptance of government employment results in the loss of legal rights enjoyed by others, and particularly when those rights are ones of procedural due process, in many instances directly protected by the Constitution (*Bloom* v. *Illinois*, 391 U.S. 194 (1968)), the ability of governments to attract employees of top qualifications will be diminished.

2. The nub of this case is concisely stated in the minority opinion of Judge Keating:

> "The question is not whether public employees differ from private employees or whether the former may not strike, while the latter may, but whether the differences between them are pertinent to the subject with respect to which the classification is made, to wit, the right to trial by jury (*Baxstrom* v. *Herold*, 383 U.S. 107, 111)" (App. C, p. 53a).

The majority of the Court of Appeals wrote:

> "It is not unreasonable to assume that the Legislature, which prohibited strikes by public employees, would provide every reasonable means for enforcement of that prohibition by giving the courts the powers necessary to bring about their early termination" (App. C, pp. 37a-38a).

On the basis of its assumption the majority found an alleged purpose for the discrimination between public and private employees. It wrote:

> "Prompt determinations, unencumbered by the long, drawn out procedure involved in jury trials, are needed in criminal contempt proceedings under the Taylor Law in order to deter the continuance of paralyzing public strikes by visiting speedy punishment on the offenders" (App. C, p. 37a).

Judge Keating, for the minority, replied:

> "The 'one vital reason' offered by the majority to justify the lack of a jury trial requirement, where public employees or their representative organizations are involved, is an alleged need for 'Prompt determina-

tions' . . . In contrast to almost every other criminal statute, however, the Taylor Law postpones the enforcement of all of its penalties against the union until after all appeals are exhausted (Judiciary Law, § 751, subd. 2, par. [d], cl. [i]). While it is conceivable that the appellate process could terminate prior to the end of the strike, this has yet to happen. Therefore, in the case of the union, the purported justification for denying a jury trial has no application at all.

In the case of the short jail terms provided by the statute as punishment against union leaders, and which can be imposed immediately, it is of crucial significance that, in three major strikes against the City of New York since the Taylor Law was enacted, the city found it impossible effectively to enforce the short jail sanction to end the strikes. The same situation prevailed for 20 years under the Condon-Wadlin Act (L. 1947, ch. 391). Therefore, while the Legislature has the right to experiment, we are here dealing with a situation where the reasons offered for drawing the distinction have been shown by historical precedent to have no basis" (App. C, pp. 53a-54a).

Judge Burke, for the minority, also replied:

"So, too, the circumstances of the recent history of public employer-employee labor relations would seem to indicate that the legislators, as practical, realistic men, realized that the very resort to the court and its process in such situations often tends to exacerbate and inflame an already critical situation and has even, in the recent past, itself become a key obstacle to the resolution of such disputes and the re-establishment of the sought-after harmony and co-operation between

public employers and their employees. In the face of these facts, is it reasonable to say that the Legislature could reasonably have concluded that the withholding of a right so universally recognized as an integral part of our system of administering justice would *hasten* the end of such public employee labor disputes? The time and the circumstances provide a rather clear-cut answer to that question. The conclusion is inescapable that, in the language of *McGowan (supra)*, [*McGowan* v. *Maryland*, 366 U.S. 420 (1961)] the distinction between public and private employees, in the context of the right to jury trial, is 'wholly irrelevant' to the achievement of the legislative objectives expressed in the Taylor Act. (Cf. the equal protection analysis in *Baxstrom* v. *Herold*, 383 U.S. 107, 111-112.) . . . It is difficult, if not impossible, to conceive of any way in which the *denial* of a jury trial, in a criminal contempt proceeding brought against a public employees' union and its officers and arising from a dispute with a governmental employer, is in any way relevant to or productive of harmony and co-operation or how it could possibly be relevant to the assurance of the orderly and uninterrupted operations and functions of the government. The issue involved goes merely to the *procedure* to be invoked when a labor dispute has already occurred and has resulted in a court order which has allegedly been violated and simply has no bearing whatever on the effectuation or frustration of the expressed legislative objectives. This is particularly apparent when it is recognized that the matter of jury trial arises only *after* events have occurred which necessitate a resort to the court and its mandates in an effort to enforce compliance which

has allegedly not been voluntarily forthcoming. Nor is it conceivable that the *denial* of such a right, especially when it is *granted* in criminal contempt proceedings arising from private labor disputes, could effectuate the objectives of harmony and co-operation and uninterrupted government operations in the future. Governmental entities can show no vital or even non-vital interest which will be served by denying these defendants a jury trial. In the face of the obvious lack of relevant connection between the public-private employee distinction as to the right to a jury trial and the objectives sought to be achieved by the legislation of which the denial of a right to jury trial is purportedly a part, there is a rather clear-cut deprivation of the equal protection of the law to which *both* public and private employees are entitled." (Emphasis in original.) (App. C, pp. 49a-51a).

The minority wrote:

"It is precisely in times when the public interest is so seriously threatened that courts must heed the caution voiced by Chief Judge CARDOZO: 'Historic liberties and privileges are not to bend from day to day "because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment" * * * are not to change their form and content in response to the "hydraulic pressure" * * * exerted by great causes.' (*Matter of Doyle*, 257 N.Y. 244, 268, quoting HOLMES, J., in *Northern Securities Co.* v. *United States*, 193 U.S. 197, 400-401.)" (App. C, p. 47a).

The words of this Court in *Reid* v. *Covert*, 354 U.S. 1 (1957) at page 14 are also apt:

> "The concept that . . . constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefits of a written Constitution and undermine the basis of our Government."

Finally, this Court wrote in *Griffin* v. *State of Illinois*, 351 U.S. 12 (1956) at page 18:

> "It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. [Citations] But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty."

Similarly, even if the state is not required by the Federal Constitution to provide appellants with a trial by jury, that is not to say that a state that does grant a trial by jury to persons allegedly in contempt of a court order in a labor dispute can do so in a way that discriminates against some on account of the identity of their employer.

3. The majority sought to justify the discrimination which it wrote into the statutes in question by referring to the statement of a former Governor of the State of New York made in connection with a law since repealed for its failure. That law was designed to prohibit strikes by public employees and in no way related to the right to a trial by jury. The Governor's remarks referred to the danger to society which might result from a strike by policemen, firemen, sanitation workers or workers in a

mental hospital. It did not refer to any other public employees. This statement, to that extent, comports with the constitutional mandate that when rights are restricted or denied it behooves the government to limit its inhibitions and not entrench on areas where such entrenchment is unnecessary for the purpose of the legislation.

United States v. *Robel,* 389 U.S. 258 (1967);
Zwickler v. *Koota,* 389 U.S. 241 (1967);
Keyishian v. *Board of Regents,* 385 U.S. 589 (1967);
Aptheker v. *Secretary of State,* 378 U.S. 500 (1964);
Shelton v. *Tucker,* 364 U.S. 479 (1960).

Government employment includes not only policemen and firemen, but also school teachers and park department employees who manicure putting greens on public golf courses.

Assuming solely *arguendo* that a trial by jury in a criminal contempt case arising out of a labor dispute might constitutionally be denied to a policeman or fireman where the loss of his services for even a day might result in disaster, such an assumption does not warrant a construction of statutes which denies that right to public employees in positions where the cessation of their services does not cause such hardship.

The majority sought to widen the scope of the Governor's remarks. It wrote:

"And, we would add, if called by teachers in the New York City public school system, such strikes would not only deprive children of their fundamental and stat-

> utory right to a basic education—thereby severely handicapping them in their efforts to attain higher education and future employment—but it would also impair their respect for law" (App. C, p. 38a).

Surely it is unreasonable to maintain that education delayed is education lost. Fortunately, what is not learned yesterday can be learned tomorrow. The public schools in New York City were closed during some days in the Fall of 1968, but almost all lost time was thereafter made up by longer school days and shorter holidays. Students were not "severely handicap[ped] . . . in their efforts to attain higher education and future employment".

It cannot reasonably be maintained that the closing of schools by strike brings disaster upon a community. Schools are completely closed for more than two months during the summer and for extended holidays at other times during the year. Unlike the police and fire services, continuous operation is clearly not needed by teachers to maintain the health and safety of the community.

It is, of course, completely irrelevant to the students' "respect for law" that his teacher, after his illegal conduct, is found guilty of criminal contempt by a jury rather than by a judge without a jury.

Indeed, the poverty of the majority's reasoning in attempting to overcome the unconstitutionality inherent in its overbroad as well as unequal construction of the statutes, exposes the fallacy of its holding. The error in such a construction of the statutes is compounded when it results, as the minority points out, in the denial of rights to non-essential public employees while no such denial is imposed on private employees admittedly performing services more essential to the public health and safety.

CONCLUSION

For the reasons stated Appellants respectfully submit that this case presents substantial Federal questions concerning the scope of the 14th Amendment in the field of public employment. The need for consideration and resolution of these questions warrants that probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals of June 5, 1969

STATE OF NEW YORK

COURT OF APPEALS

No. 216

J. LEE RANKIN, Corporation Counsel of The City of New York, &c.,

Respondent,

vs.

ALBERT SHANKER, & ors., &c.,

Defendants,

ALBERT SHANKER and UNITED FEDERATION OF TEACHERS, &c.,

Appellants.

PER CURIAM:

Our opinion in *Rankin* v. *Shanker* (23 N Y 2d 111; see, also, *Shanker* v. *Rankin*, 393 U. S. 930 [denying application for stay]), when these same parties were before us in October of 1968, discussed and passed upon the precise question now urged by the appellants. It is wisely established, as we had occasion to say some 70 years ago (*Matter of Laudy*, 161 N. Y. 429, 434-345), "[w]hen the court has jurisdiction of the cause and of the parties,

its judgment is conclusive between the parties and their privies, not only in all other actions, but also in all other proceedings in the same action. (*Roberts* v. *Cooper*, 61 U. S. 467-481; Wells Res Adjudicata, 370; Ram on Legal Judgments, 292; Herman on Estoppel, 274.) The principle established in all jurisdictions is that so long as the facts remain the same, the rule of law once held by the court of last resort remains the rule throughout the subsequent history of the cause, in all its stages, except under extraordinary circumstances, which do not exist in this case." In any event, though, even if we were to disregard that salutary principle and give consideration to the additional material which the appellants presented on this appeal, as well as those which they say were overlooked when the case was previously here, we would adhere to the decision then made.

The order should be affirmed, without costs.

* * * * *

Upon the appeal by defendants Shanker and United Federation of Teachers, Local 2: order affirmed, without costs. Opinion Per Curiam. Concur: Fuld, Ch. J., Scileppi, Breitel and Jasen, JJ.; and Burke and Bergan, JJ., solely on constraint of *Rankin v. Shanker* (23 N Y 2d 111).

APPENDIX B
Opinion of Hon. Francis J. Bloustein, J.S.C., Which Preceded the Order and Mandate

Plaintiff, on behalf of the Board of Education of the City of New York, seeks an order under Sections 750 and 751 of the Judiciary Law adjudging the defendants United Federation of Teachers, Local 2 American Federation of Teachers, AFL-CIO (hereinafter referred to as UFT), Albert Shanker, individually and as President of UFT, Council of Supervisory Associations (hereinafter referred to as CSA), and Walter J. Degnan, individually and as President of CSA, guilty of and punishing them for criminal contempt of this Court, for wilful disobedience of lawful mandates and orders of this court, made on September 9, 1968 and September 30, 1968.

The action herein was instituted on September 9, 1968, with the service of process on the defendants, to enjoin them from engaging in any strike or work stoppage affecting the performance by the members of the defendant employee organizations of the duties of their employment as teachers, principals or supervisors, etc., by the City Board of Education, in violation of the no-strike provisions of the Taylor Law (Civil Service Law, Art. 14, § 210, subd. 1).

This Court granted a temporary restraining order against the defendants, by order to show cause dated September 9, 1968, and after a lengthy hearing a preliminary injunction was granted against the defendants by order of this Court made on September 30, 1968. The order of September 30, 1968, found that the defendant employee organizations and the individual defendants Shanker and Degnan were engaging in activities which constituted strikes and work stoppages in violation of the Taylor Law.

It also found that the UFT and CSA were employee organizations as defined by statute. During the hearing on the motion for the preliminary injunction, this Court requested that the strike be discontinued and that the memberships of the two organizations resume their normal teaching and supervisory duties. This motion to punish for criminal contempt is made on the plaintiff's charge that the defendants have wilfully and deliberately disobeyed this court's orders of September 9 and September 30, 1968.

The disposition of this matter was delayed by reason of certain procedural objections raised by the defendants in accordance with their legal rights. Initially, the defendants Shanker and UFT traversed the service of process upon them, and after hearings, their objections were overruled. All the defendants then requested a trial by jury on the motion to punish them for criminal contempt. This Court held that the defendants were not entitled to a trial by jury, in an opinion dated October 15, 1968, and its decision was affirmed on appeals taken by the defendants first to the Appellate Division (October 24, 1968) and then to the Court of Appeals (October 30, 1968). The defendants then sought to bring the matter before the Supreme Court of the United States by an application for a stay, which was denied by that court on November 8, 1968. Hearings on the criminal contempt proceeding then commenced on November 13, 1968 and were concluded on December 13, 1968. Counsel were given an opportunity to submit memoranda of law, and the last of such memoranda was received by the Court on January 17, 1969.

In connection with this motion, testimony was received from 48 witnesses, 19 for the plaintiff and 29 for the defendants, and 2,600 pages of stenographic minutes were taken. There were also 80 exhibits received in evidence, 40 being submitted by the plaintiff and 40 by the defendants.

It should be noted at the outset that there were three distinct strikes and work stoppages involved on the part of the great majority of the school teachers holding membership in UFT and of the principals, assistant principals, and supervisors, etc., belonging to CSA, which resulted in practically a complete shutdown of the public schools in this City. The initial work stoppage took place on September 9, 1968, the first day of the Fall school term, and continued until September 11. The second work stoppage took place on September 13 and lasted until September 27, 1968. The third work stoppage began on October 14 and ended on the afternoon of November 18, 1968.

The narrow issues presented by this proceeding are whether these defendants have been proved to be guilty, beyond a reasonable doubt, of wilful disobedience to lawful and clearly expressed mandates of this Court, and, if so, the extent of the punishment to be imposed therefor.

By way of defense, the defendants have urged that they engaged in the challenged work stoppages in good faith, and for the protection of the rights of their members, in the face of "extreme provocation" stemming from the school decentralization program initiated by the Board of Education in the Ocean Hill-Brownsville district, one of three demonstration districts established pursuant to legislative direction (L. 1967, ch. 484). Because of the wide-

spread public interest in this matter, the Court permitted the defendants wide latitude in the introduction of evidence, and such evidence dealt with the concept and desirability of school decentralization in general, the manner in which the decentralization was being implemented in the district involved, the powers of the State Commissioner of Education, as well as of the City Board of Education and the Superintendent of Schools, the status and powers of the Local Governing Board and the Unit Administrator of the Ocean Hill-Brownsville district, and the events leading up to the three school strikes.

To a large extent, the position taken by the defendants appears to be an attack on the propriety of the injunctive orders which they are charged with having violated, as well as to offer proof of the root causes which led to the work stoppages. It is axiomatic, however, that "Even an appellate court would not review the propriety of such injunctions on a motion to punish for criminal contempt whatever it might do on a direct appeal", and that "a contemnor may not question the validity of the order violated" (Mount Sinai Hosp. v. Davis, 8 A D 2d 361, 363; see also United States v. Mine Workers, 330 U. S. 258, 293).

Nor may the defendants justify or excuse any wilful and deliberate violation of such injunctive orders on the claim that they were provoked to engage in the work stoppages by acts on the part of the Board of Education and others. Compounding wrongs obviously did not help in a solution of the problems. It is trite and simple, but true—"two wrongs do not a right make". Defendants point particularly to the conduct of members of the Ocean Hill-Browns-

ville Local Governing Board and the Unit Administrator, which seriously threatened the safety and rights of their members, and they claim that they were motivated by a bona fide intent to protect their members against an unlawful invasion of their rights.

The statute (Judiciary Law, § 751, subd. 2 [a]) authorizes the court to consider evidence of "such acts of extreme provocation as to detract from the responsibility of the employee organization for the strike", *but only in connection with determination of the quantum of the punishment* to be imposed on an employee organization found to be guilty of wilful disobedience to a lawful court mandate. While relevant to the issue of punishment, no acts of alleged provocation, no matter how "extreme", could warrant or excuse the defendants' wilful defiance of this Court's mandates and cannot be considered as a defense.

At the outset, it must be stated and made as clear as possible that our government cannot long endure as we have known it if individuals and groups decide for themselves which laws and court orders they will obey and which they will defy and when they will take such actions. Obeying or disobeying a law or order of a court is not a personal choice of any individual or group of individuals. Nor does it rest upon the personal wish, whim or desire of any individual or organization.

"The purpose of a criminal contempt proceeding for wilful disobedience of its lawful mandate is to vindicate the authority of the court and its orders." (Mount Sinai Hosp. v. Davis, supra, at p. 363.) "The interests of orderly government demand that respect and compliance be given to

orders issued by courts possessed of jurisdiction of persons and subject matter. One who defies the public authority and wilfully refuses his obedience, does so at his peril." (United States v. Mine Workers, supra, at p. 303.) Mr. Justice Frankfurter in a concurring opinion in that case, after observing that we are "a government of laws and not of men" (p. 307) wrote that chaos and tyranny would result if individuals were left free to decide for themselves which laws and court orders they will obey and which they will defy (p. 312).

As the Court of Appeals has recently declared (City of New York v. DeLury, 23 N Y 2d 175, decided October 30, 1968) in an opinion by Chief Judge Fuld, sustaining an adjudication of criminal contempt against a public employee organization and its president found guilty of having wilfully disobeyed an injunction against striking: (p. 188)

> "* * * Self interest of individual or organization may not be permitted to endanger the safety, health or public welfare of the State or any of its subdivisions. *There was here indisputable proof not only of deliberate disobedience of the explicit provisions of the Taylor Law but wilful defiance of the court's lawful mandates as well. Such defiance, the more egregious when committed by employees in the public sector, is not to be tolerated.*" (Emphasis supplied)

The community generally is entitled to expect that public employees serving them and enjoying the advantages and benefits available to civil service employees such as tenure of office, promotional rights, sick leave, pension

rights, and collective bargaining will respect the law and orders of the courts. Such employees must honor and obey the law. If one be dissatisfied and unhappy with a particular statute, his recourse is to the Legislature for a change in the statute. Until such change takes place, the law must be obeyed and if orders are made by the courts requiring obedience to such statute, there must be compliance with such orders and upon failure to obey, criminal contempt will lie (Judiciary Law; section 750). The leaders of labor unions both in the private sector and the public sector, and those they represent, are ever ready to decry any actions which may be taken against them and their interests and which in their opinion do them harm or prejudice them, if such actions be contrary to existing law. They, too, look to the law and ask that it be applied for their benefit and protection. No less should be required of them.

The injunctive orders granted in this case restrained the defendants, in clear and unmistakable terms, from engaging in work stoppages in the public schools. The evidence undeniably established that the defendants nevertheless persisted in engaging in such work stoppages in wilful and deliberate defiance of this Court's mandates.

The Court does not accept Shanker and UFT's position that there was no wilful defiance. In raising such arguments, they indulge in the sheerest form of sophistry. Judge Fuld, in the De Lury case, supra, answered a similar contention this way: "We cannot accept the highly technical or hair-splitting arguments urged upon us in an attempt to evade compliance with the court's lawful mandates."

There is no merit to the defendants' contentions that they were not guilty of "wilful defiance" because they were not motivated by a bad faith intent to defy the Court's authority. "The word 'willful', even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law" (American Surety Co. of New York v. Sullivan, 7 F. 2d 605, 606 [per Learned Hand, J.]; Dennis v. United States, 171 F. 2d 986, 990, affd. 339 U.S. 162). All that is required is proof of "an act knowingly done with the purpose of doing that which the statute prohibits" (Screws v. United States, 325 U.S. 91, 102). Similarly, the element of "criminal intent" requires only proof of awareness of "the existence of all those facts which make * * * [a defendant's] conduct criminal." (United States v. Crimmins, 123 F. 2d 271, 272 [per Learned Hand, J.])

Here, the evidence unmistakably established that the defendants knowingly and deliberately continued for an extended period of time to engage in conduct "with the purpose of doing that" which this Court's mandates enjoined them from doing. The requirement of proof beyond a reasonable doubt of a wilful defiance by the defendants of this Court's orders was thus amply satisfied (See United States v. Mine Workers, supra, at page 303; City of New York v. De Lury, supra, at page 187; Olin Mathieson Chemical Corp. v. Lindemann Pharmacy, Inc., 8 A D 2d 802, 803).

Let us first consider the evidence relating to the defendants Shanker and UFT. As noted, the initial work stoppage took place on September 9, 1968, the day on which

the temporary restraining order was issued. The evidence showed that UFT made full advance preparations for this work stoppage, which they openly referred to as "strike action", and that such "strike action" was recommended by the UFT Executive Board on August 30th, 1968 and approved by the UFT Delegate Assembly on September 6th and by the UFT membership on September 8, 1968. On the latter date, Shanker told the Superintendent of Schools " * * * The schools will not open tomorrow. The teachers will not be at work".

On September 8, 1968, the day preceding the first strike, Shanker stated on a television interview show " * * * the question is not whether schools will reopen tomorrow but when will they?"

An accord was reached between the Board of Education, and Shanker and Degnan on behalf of the members of UFT and CSA, and the teachers and principals went back to their schools and assignments on September 11 and 12, 1968. The second strike started on September 13, 1968 and continued until September 27, 1968, when a settlement was again reached.

That defendants Shanker and UFT were fully aware that their strike activities might subject them to punishment for criminal contempt of the Court's orders is confirmed by several events that occurred on September 17, 1968, while the second strike was in progress. The Executive Board of UFT adopted a resolution that day, which provided that Jules Kolodny, Secretary of UFT and also assistant to Shanker, " * * * act as President of the union in the event the President (Shanker) is sentenced to jail".

Further, on the same day in a talk over Station WEVD, Shanker said, "I urge everyone to listen, stand together, maintain picket lines, *don't worry about court or about jail*, just let's keep ourselves together. We'll win". (Emphasis supplied)

The second strike lasted until October 14, 1968. The third strike started on that day and lasted until the afternoon of November 18, 1968. This third strike was also officially recommended by the UFT Executive Board and approved first by the Delegate Assembly and then by the membership, with Shanker taking an active part in presenting the Executive Board's recommendations to the UFT rank and file.

Throughout the periods embraced by the three strikes, Shanker and other representatives of UFT, continually urged the UFT membership to continue their strike and picketing activities until satisfactory terms were obtained for settlement of the strike. In a talk over radio station WEVD on September 27th, Shanker thus stated, "The strike is still solid and it will continue to go on". "We are urging teachers not to go into schools to perform any activities during the period of the strike".

In a talk over the same station on October 14, 1968, he addressed the UFT membership as follows, "You are all out on strike and you're loyal to the Union, and you're willing to stay out as long as necessary • • • ".

In an interview program on the same day over radio Station WINS in answer to a question, he said, "Well, we're continuing the strike and we're going to continue to conduct it".

A certified excerpt of a newscast over Station WINS of a rally in support of the school strike, held at City Hall on October 17, 1968 indicated the statements of Shanker and the response of those listening as follows: "Among all of those here, I want to see whether we are willing to stay out if necessary for another week or so? (Yeah) How about two weeks? (Yeah) Are we ready to stay out a month if it takes that? (Yeah) Are we going to stay out until we win? (Yeah). Those are the answers that the Mayor must hear • • •. We are not fooling".

On October 18, 1968 Shanker stated in a radio broadcast over WEVD "Today was one of the best strike days that we had. We had support from other unions respecting our picket lines • • •. More schools were closed today. More teachers out, and the more they (Board of Education and Superintendent Donovan) continued their strikebreaking activities, the more there will be cooperation by the rest of the labor movement • • •".

On October 22, 1968 Shanker again over Station WEVD said "Once again, we had a very successful day in terms of the strike. Most schools were closed. Very few are opened and those schools that were opened, very few teachers or pupils in those schools. The support of other unions in labor movements been very important, • • •, we are assured there will be even further support by other unions."

On October 25, 1968, Shanker stated in a radio talk, "We must win this strike". On October 31, 1968 he stated that the teachers who are out on strike are going to stay on strike. On November 8, 1968 Shanker, in a talk to his membership, said, "Let's not start going back. If we go back, we go back without a union • • •".

In support of its strike activities, the UFT ordered the installation of certain telephone answering equipment at its headquarters to provide callers with recorded messages at an installation cost of $1,000 and a monthly charge of $600.

On October 22, 1968, a witness called UFT on the telephone and a recorded message in part over this "hot line" stated "Listen to Al Shanker on Radio Station WEVD at 8:45 P.M., Monday thru Friday. It is important that all picketing be maintained. The custodians have voted to support us and expect to see picket lines in front of the schools each morning."

It is needless for the Court to continue quoting from additional radio speeches made by Shanker and others, which provide ample proof of his and UFT's willful defiance, since they would be repetitious in character.

The testimony indicated that meetings between Shanker and officers of UFT and Bergman and officers of CSA and the custodians were held with some regularity during the course of the strikes. Efforts at coordination among all the defendants were clearly established by the evidence. There was evidence that the school custodians were asked to, and did, join in the work stoppages.

In addition to the formal actions which have been described, the proof shows that Shanker and UFT incurred expenses of about $250,000 in full page newspaper advertisements, daily radio and television broadcasts, a telephone answering system from UFT headquarters, picket signs and picketing. UFT entered into an agreement with Radio Station WEVD to broadcast a daily message from

Shanker or other officials of UFT. This was announced in the daily press.

The Court finds a distinction between the actions of Shanker and UFT and the conduct of Degnan and CSA, with respect to the extent of the wilfulness and intent to disobey the orders which it is claimed by plaintiff amounted to criminal contempt. This does not mean that Degnan and CSA have not wilfully defied the lawful mandates and orders of this Court. What the Court is pointing to is that the degree of disobedience can be measured in assessing punishment.

As regards the defendants Degnan and CSA, the evidence showed that those defendants, while not the prime movers in the work stoppages herein involved, did actively support the three strikes and that the majority of the principals and supervisors belonging to CSA were absent from their schools during the strike periods.

CSA claimed that it did nothing more than to urge its members, as reflected by resolutions adopted by it, "not to open their schools to admit children" while the teachers were on strike because the safety of the children would be jeopardized by the absence of teachers.

Motivating factors over and beyond concern for the safety of the school children were shown by the evidence to have influenced the actions taken by the defendants Degnan and CSA. There was uncontroverted testimony by Superintendent of Schools Donovan that in discussions with Mr. Degnan, the latter indicated that CSA would not return to work unless the conditions which had been demanded by UFT for the settlement of the strike were met. He further testified that Degnan stated, when asked

whether the membership of CSA intended to strike, "Well, I don't know whether he used the exact words, but he did say 'Our members are not going to go back to work or open the schools until we get our conditions met'."

Mr. Doar, President of the Board of Education, similarly gave uncontroverted testimony that Degnan had told him that CSA would not go back to work unless "something is done" about certain school principals claimed by Degnan to have been illegally appointed in one of the experimental school districts.

Further, in an interview program over WOR TV on November 14, 1968, Degnan, in response to a question as to his and CSA's participation in the strike, then in existence, said, "Now, let me say, when we joined with the union (UFT) in this, there was much thoughtful contemplation about what was the best procedure and the one thing that motivated every supervisor, who fought for this, was the fact that the future of education was at hand; * * *, we are convinced we are fighting a good fight". In answer to another question, which asked why some schools were opened, he said, "Schools are open and none of our people are there * * *." The acts of Degnan and CSA under these circumstances were of a lesser degree of defiance and might so be considered.

There was also testimony that the officers of CSA were at UFT offices and discussed cooperation with UFT in its strike and exchanged information about their common problems.

While defendants failed to produce an adequate and proper defense to the motion to punish, they did present a novel question for consideration. They contended that

their actions, which this Court found constituted strikes, were provoked by the failure of the Board of Education to act under the law. Throughout the hearing on the motion for a preliminary injunction, the defendants raised provocation as a defense. This Court refused to consider such defense and refused to entertain any evidence with respect to alleged provocation in that proceeding. The Court indicated it might receive such evidence on a motion to punish. Hence the wide latitude in the reception of such evidence in this proceeding. It appears from the evidence that the provocation may have been created by the actions of individuals not parties to this proceeding, by the failure of the Board of Education to act with respect to such provocative acts and by the action or inaction of the Board of Education and its representatives with respect to other matters.

The conflict we are discussing did not involve the usual labor dispute in which a contract has expired and the parties negotiate toward the execution of a new collective bargaining agreement. Here, an agreement by the Board of Education and UFT is in existence. No questions were raised with respect to wages and hours.

The issue, here, involved a claim by the defendants that the rights of school teachers, non-teaching personnel, supervisors, principals, assistant principals, administrators and other personnel, guaranteed under the existing collective bargaining agreement, had been breached by the action or inaction of the Board of Education.

After the three demonstration districts were created, it became clear that proper and sufficient guidelines and ground rules to assist in the implementation of decentrali-

zation were not adopted. Perhaps this question was left to improvisation, which was unfortunate. As a result, the Local Governing Boards and the Unit Administrators in the demonstration areas acted independently and autonomously, without regard to any authority in the Board of Education.

At any rate, in the Ocean Hill Brownsville district, the Unit Administrator who was designated by the Local Governing Board, and who functioned as a District Superintendent in the Spring of 1968, summarily discharged a number of teachers who were assigned to teach in the schools within his jurisdiction and prohibited them from teaching. When this occurred, several hundred other teachers—all members of UFT—in an act of solidarity and in support of their fellow members who were discharged without charges or an opportunity to be heard, boycotted their classrooms in the schools to which they had been assigned in the district under the jurisdiction of the same Unit Administrator, and did not teach.

Following this occurrence, the Unit Administrator refused to permit, not only the teachers whom he had discharged, but those who supported them, to return to their teaching positions when the school term opened on September 9, 1968.

Let this be clear. This Court is not ruling on nor is it giving any opinion with respect to the propriety or the justification for the discharge of the teachers by the Unit Administrator, or of his refusal to permit those teachers who walked out, because of their sympathy with their fellow union members, to pursue their teaching positions. These matters are not before this Court, and no judgment is intended with respect to them.

Mention is made of these factors only so that the Court's determination and opinion will have coherence and relevancy. This proceeding cannot be undertaken in a vacuum, since the Court must be mindful of all the factors and will consider the entire question as one "ball of wax".

The questions raised by this proceeding to punish the defendants are complex and challenging. Great social changes are taking place. It is evident that this is a time of crisis and upheaval in the educational system of New York City. If one stands off at a distance and views the efforts at school decentralization in this conglomerate City, one sees various forces at work. The power plays are there for everyone to witness. The rights of a community to exercise a meaningful involvement in the education of their children, the efforts on behalf of teachers, supervisors, principals and other professional personnel to protect their rights acquired after long years of work and effort involving questions of due process, job security, tenure, pension rights and many other collateral matters which have created vested rights for the members of UFT and CSA, are involved. One must not overlook the central agency, the Board of Education, which is charged with the entire problem of the administration of the school system, involving 900 schools with all the concomitant problems of personnel, budget and curriculum, for the education of more than 1,000,000 children. Obviously, the Board of Education must adjust its functions and relinquish some of its duties as areas are decentralized. Nor should one overlook the rights of those teachers, who were not teaching in the experimental or demonstration areas involved, to have the schools to which they have been assigned operate normally and effectively without regard to the dispute taking place

in one of the demonstration districts far removed from their assigned schools.

The parents who had to share the burden with their children of non-schooling during the strikes in those school districts not in the district involved had every reason to feel aggrieved.

The statement of these facts does not limit the questions considered by this Court to those mentioned alone. Other parties have interests that are recognizable by the Court. The Local Governing Boards and the Unit Administrators also have responsibilities which must be considered.

This Court, in granting a preliminary injunction against these defendants, spoke of the rights of all the interested parties and said, among other things (Opinion, September 26, 1968), "The issue of decentralization * * * and the right and the need for a community to participate and undertake meaningful involvement in the education of their children can no longer be questioned". I want to add that the ultimate objectives of decentralization are sound and desirable. The rights and aspirations of the disadvantaged in our City must no longer be denied. However, such changes cannot be established at the sacrifice of constitutional guarantees belonging to others.

It is clear that the Court does not have before it all the parties that have contributed to, or have been involved, in the present unfortunate situation. For good legal reasons, not all the individuals or organizations responsible, directly or indirectly, for the strikes are within reach of this Court and subject to its orders.

The traumatic effect of the strikes on the children who could not pursue their education cannot be minimized.

Teachers who are authorized to teach, among other things, adherence to law and order and regard for the rights of others, were by their actions in striking encouraging disregard for law and order and engaging in actions which were contrary to the rights of students and others and in contravention of existing statutes.

Children who are impressionistic should not be subjected to strikes. Such action is dangerous and inimical to their welfare. How can one expect school children to act as good citizens and to obey laws and orders when all about them they see their teachers flouting the law and disregarding court orders? Respect for the courts and for law and order must start with the teachers. They should set the example to be followed by the children. All means short of the strike should have been employed and exhausted by these defendants. At no time did Shanker and UFT institute any legal proceedings against the Board of Education to enjoin it, the Local Governing Board and the Unit Administrator in their actions. Nor did they make any legal effort to correct any of the conditions which they allege infringed on their rights. Instead, they took matters into their own hands and struck the school system because they believed it was more expeditious to do so and that results would flow more readily to their liking.

The defendants Shanker and UFT called attention to a number of actions which they allege constituted "extreme provocation" for consideration by the Court. The defendants claimed that the Local Governing Boards and the Unit Administrators and strangers to the communities acted contrary to the declared policy of the Board of Education and that the Board failed to act in taking legal or

other corrective measures. They testified (2) that the second and third strikes were ordered because the Board of Education and the City of New York took no steps to stop acts of abuse, violence and harassment in schools in the districts involved. Further (3) the Board of Education permitted the Local Governing Board and the Unit Administrator in the district involved to continue functioning, although they were suspended by the Board of Education. It was also alleged (4) that the Board of Education and the Superintendent of Schools did not adequately guarantee the safety of teachers in the schools in the demonstration district. They also claimed (5) the Board of Education breached its contract with UFT when it divested itself of its administrative discretion in certain matters by transferring such discretion to the Local Governing Boards and Unit Administrators without consultation and negotiation with Shanker and UFT.

There is uncontraverted evidence that known militants and extremists, strangers to the communities involved, contributed to the unrest and violence and harassment that, it is claimed, provided the "extreme provocation" that resulted in the strikes.

The evidence further indicated that such strangers to the community, who had no children in the schools, came into the area. They demonstrated, they marched, they harangued and harassed members of the UFT. These persons entered school buildings and classrooms in the district with the consent and knowledge of the Governing Board and the Unit Administrator. They threatened UFT teachers with physical harm, insulted them, humiliated them and generally disrupted the atmosphere of the schools. Their

presence on such occasions created explosive situations. The total effect of such conduct, to which witnesses testified, obviously was the producing cause of at least two of the three strikes and the creation of a feeling of unrest in the community and terror for many of the UFT teachers.

Deepset emotions were aroused by such conduct. Community tensions were exacerbated and ethnic relations were strained and ruptured.

The testimony indicated that feelings of hatred surfaced. The positions of the parties became fixed and inflexible. An intransigence set in and appeared to override common sense. Racial and religious bigotry was aroused and came out into the open. Racial prejudice became the order of the day. There were daily confrontations of a destructive character—whites against blacks, blacks against whites. Hatemongering was current and anti-Semitism was practiced by many by word of mouth and in writing. Hate literature was distributed with clear anti-Semitic overtones and then, very unwisely, reproduced and distributed by the UFT.

In their claim of "extreme provocation" Degnan and CSA point to the illegal appointment by the Board of Education in 1967 of uncertified principals to the schools in the demonstration area involved. Following such appointment, CSA brought legal proceedings to correct what they claimed offended the merit system. This was the orderly and proper way to deal with the problem.

It appears that the Superintendent of Schools as well as the Board of Education made every effort short of dismissing the Local Governing Board and discharging the Unit Administrator of the area involved to secure compli-

ance with the agreements reached between the Board of Education and UFT and CSA in the settlement of the first two strikes.

In treating the question of "provocation" as bearing on the extent of the punishment to be imposed, this Court finds there was a good deal of merit to the grievances voiced by the defendant employee organizations and their demands for corrective action. It is clear, however, that no matter how justifiable their complaints may have been, they were obviously not justified in seeking a remedy through an illegal means.

It should have been clear to all concerned, especially to the State Legislature and the Board of Education, as long as a year ago or more, that deep trouble was brewing over school decentralization, and yet, neither the Legislature nor anyone else in official office took the necessary steps to forestall an agonizing conflict by supplying a mechanism (criteria, guidelines, and restraints) for its implementation and resolution. This failure on the part of the Legislature and the Board of Education to establish the necessary guidelines for implementation of the demonstration areas contributed in a large measure to the unfortunate conditions that brought about the strikes. Had the appropriate governmental agencies acted at an early date, there could have been invoked in a timely manner a rational procedure designed to take due account of the aspirations, fears, rights and responsibilities of all the parties in interest. And the City of New York would have been spared the extreme rancor and divisiveness which I described earlier and which we have witnessed. Instead, resort has been had to the crisis remedy of injunctive relief

and contempt proceedings, legal remedies of last resort under any circumstances, and legal remedies especially suspect, where, as here, the underlying cause of stress is related to a profound, and as yet unresolved, political and social crisis.

Anyone who has followed the tortured course of the controversy of school decentralization in New York City is aware that it is but one facet of a much more fundamental political and social cleavage in our society. Moreover, even a casual observer of the events which gave rise to this contempt proceeding must know that the parties who are immediately before me—The Board of Education of the City of New York, the UFT, CSA and their leaders—are decidedly not the only parties who have a stake in the outcome of this conflict and, as I have already stated, decidedly not the only parties whose actions have affected the past or will affect the future course of the struggle. A court which is only authorized to deal with the bare symptoms of a profound and urgent social upheaval and which has before it only some of the participants in that cataclysm would be lacking in candor and political perspective were it not to acknowledge, as I now do, that its order and its remedy do not extend far enough to deal adequately with the pressing issues of public policy clearly evidenced in this proceeding.

Given these limitations on the force and effect of this Court's judgment in this case, it is obvious that no one can conceivably regard my decision in this matter as a "solution"—as even a partial "solution"—to the problems of decentralization. Even more important are the lessons which should necessarily flow from the limited character

of this proceeding. All parties must agree on a constructive resolution of the many conflicting suggestions that have been presented. A common purpose must be found. Reason and understanding must prevail. The Court's decision cannot appropriately be regarded as a "victory" or a "defeat" for any of the parties to the conflict. None of the parties, directly or indirectly involved in this matter, have been without fault. All have contributed to the conflict and all must share the responsibility. No one is without blame. Since the underlying conflict in educational and political values was not before the Court and could not appropriately affect its judgment on this motion to punish, the decision, as already indicated, cannot be taken to speak to these issues.

One of the by-products of the strikes has been the corrosive and inflammatory effect of the confrontations between the UFT and those opposing it on the community involved, and such ill effects have spread throughout the City. The undesirable and damaging results have been far reaching and will obviously remain in this community and elsewhere in the City of New York for many years unless Herculean efforts are made by all citizens, black and white, Puerto Rican, Jewish and non-Jewish, consciously to correct the devastating harm that has resulted.

One further observation is appropriate. Both the membership of UFT and CSA and the black community are suffering from a feeling that values which they regard as most vital to them are gravely threatened, and rightly so. Neither group has thus far been willing or able to find a common ground with the other. And yet, there is a common ground which both must ultimately recognize and which

this Court proceeding symbolizes and by this decision vindicates. The common ground which will bring these parties together is a resolution that the continued vitality of our system of rational legal process for settling disputes is more important to any or all segments of our society than any issue which divides us. We must make common cause in the defense of due process of law, in defense of a democratic procedure for settling conflicts, lest violence, demagoguery and authoritarianism rob us of our heritage.

To be sure, there are those who say that our legal institutions are unresponsive and that they unduly favor the status quo. And, in fact, whether out of inertia or lack of courage or of comprehension of the total needs of the community, both the Legislature and the School Board have been unfortunately unresponsive to the needs of both the black community and the UFT and CSA in respect to the school decentralization issue. But the answer is not to fly in the face of law and legal process and to resort to forms of direct action which threaten the eventual destruction of our democratic institutions. My criticism is levelled here at all the parties responsible for and who participated in the actions leading to the strikes and to this proceeding.

The answer, rather, is to assert the awesome forces of public opinion on the seats of power, legislative, executive and administrative. Only thus can justice be done while assuring the preservation of the institutions of justice. To gain the one while overlooking the other would be to sacrifice the candle for the momentary light of the flame. It is this very proposal which gives such significance to this proceeding. And I again ask whether a party, however aggrieved he may be, may flout the orders of the Court. The answer is, of course, that he may not. But this is

precisely what the defendants herein did and why they must suffer the sanction of contempt.

In October of 1967 Shanker and UFT were defendants in a contempt proceeding following a strike and work stoppage (Board of Education v. Shanker, et al., 54 Misc 2d 941, aff'd 29 A D 2d 634 [1st Dept. 1967]). Shanker at that time was fined the sum of $250 and sentenced to jail for a period of 15 days for wilful disobedience of the Court's order. UFT was fined the sum of $150,000. Such imprisonment and fines were in accordance with the provisions of Section 751 of the Judiciary Law.

In all, the strikes involved in this action lasted for 35 school days, the longest work stoppage suffered by the Board of Education. This does not include holidays and weekends when schools were closed. Plaintiff contends that UFT was on strike for 62 days and CSA was on strike for 56 days. These figures are reached by adding to the 35 actual school days that were struck, the days on which although the schools were open the defendants defied the restraining orders and the weekends.

The Court, in reviewing the exhibits, finds that the 62 days and 56 days should be reduced to 53 days for UFT and 52 days for CSA. The Court disallows the days when schools were open and the intervening holidays.

Plaintiff has submitted findings on which I have ruled as indicated in the margin thereof. This opinion and decision as well as the facts marked "Found" on the findings shall constitute all the facts found by the Court.

The evidence establishes beyond a reasonable doubt that the defendants Albert Shanker, as an individual and as President of UFT, United Federation of Teachers, Walter

J. Degnan, as an individual and as President of CSA and the Council of Supervisory Associations, have wilfully, deliberately and continually violated and disobeyed the lawful mandates and orders of this Court of September 9, 1968 and September 30, 1968, and the named defendants are therefore adjudged guilty of criminal contempt of this Court pursuant to Section 750 of the Judiciary Law.

Punishment and the penalties that may be imposed upon an individual and an employee organization found guilty of criminal contempt are provided for in Section 751 of the Judiciary Law. Punishment for an individual "* * * may be by fine, not exceeding two hundred and fifty dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court" (subd. 1). With respect to the punishment of an employee organization, the statute provides, "the punishment for each day that such contempt persists may be by a fine fixed in the discretion of the court in an amount equal to one fifty-second (1/52) of the total amount of annual membership dues of such employee organization or ten thousand dollars whichever is the lesser; * * *" (subd. 2[a]). The lesser amount is $10,000. The evidence indicates that the net worth of defendant UFT is $925,000 and the total periodic dues collected as of December 10, 1968, for the 12-month period ending December 31, 1968, is $2,820,000. The evidence further establishes that the net worth of the defendant CSA is $71,908.06 and the total periodic dues for the school year ending August 31, 1968, is $99,381.

In fixing the amount of the fine against UFT and CSA, the Court will take into consideration that "extreme provo-

cation", for which responsibility may be placed upon the employer representatives, was responsible to some degree for the actions of UFT and CSA. Plaintiff claims that the employee organizations (UFT and CSA) did not allege "extreme provocation" in their pleadings. This, however, is not fatal. The Court will not sacrifice form over substance. There is ample evidence before this Court to warrant a finding of "extreme provocation as to detract from the responsibility of the employee organization[s] for the strike[s]." (Section 751 subd. 2[a].)

The fines against UFT shall be computed as follows: 35 days at $5000 per day and 18 days at $2500 per day; and against CSA, 35 days at $1000 per day and 17 days at $500 per day.

It is the judgment of this Court that the defendant United Federation of Teachers is fined the sum of $220,000 for its wilful disobedience of this Court's lawful mandates and orders. The defendant Albert Shanker is fined the sum of $250 and sentenced to jail for a period of 15 days for his wilful disobedience of the Court's mandates and orders. The defendant Council of Supervisory Associations is fined the sum of $43,500 for its wilful disobedience of the Court's lawful mandates and orders. The defendant Walter J. Degnan is fined the sum of $125 and sentenced to jail for a period of 3 days for his wilful disobedience of the Court's mandates and orders.

Dated: February 3, 1969.

FRANCIS J. BLOUSTEIN
J.S.C.

APPENDIX C

Opinion of the Court of Appeals and Dissenting Opinions

Statement of Case

J. LEE RANKIN, Corporation Counsel of the City of New York, on Behalf of the Board of Education of the City of New York, Respondent, *v.* ALBERT SHANKER, Individually and on Behalf of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO, et al., Appellants.

J. LEE RANKIN, Corporation Counsel of the City of New York, on Behalf of the Board of Education of the City of New York, Respondent, *v.* ALBERT SHANKER, Individually and as President of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO, et al., Defendants, and WALTER J. DEGNAN, Individually and as President of the Council of Supervisory Associations, et al., Appellants.

Argued October 29, 1968; decided October 30, 1968.

Contempt — criminal contempt — jury trial — public employees and unions which represent them are not entitled, as matter of right, to jury trial in criminal contempt proceeding brought for alleged violation of Taylor Law in that they engaged in strike or instigated, encouraged or condoned the strike.

1. Public employees and the unions which represent them are not entitled, as a matter of right, to trial by jury in a criminal contempt proceeding brought against them for alleged violation of the Taylor Law (L. 1967, ch. 392; Civil Service Law, art. 14, §§ 200–212), in that the employees engaged in a strike and the organizations instigated, encouraged or condoned such strike.

2. Section 753-a of the Judiciary Law and section 808 of the Labor Law grant the right of jury trial in a proceeding to punish, as a criminal contempt, a failure or refusal to obey an injunction order granted "in any case involving or growing out of a labor dispute". The Legislature did not intend to apply those sections to strikes by public employees.

3. To refuse a trial by jury to public employees or their representative organizations and to grant it to those in private industry does not deny the equal protection of the laws under the Constitution of either the United States or New York State. A distinction between public and private employment is constitutionally permissible.

4. The Federal Constitution (art. III, § 2; 5th, 6th, 14th Amdts.) does not require that defendants be accorded a trial by jury in a contempt proceeding where the maximum term of imprisonment authorized is 30 days. (*Bloom* v. *Illinois*, 391 U. S. 194, distinguished.)

Rankin v. *Shanker*, 30 A D 2d 956, affirmed.

APPEAL in each of the above-entitled cases, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of said court, entered October

24, 1968, which affirmed an order of the Supreme Court (FRANCIS J. BLOUSTEIN, J.), entered in New York County, denying motions by defendants for a jury trial in a proceeding to punish them for a criminal contempt of court. The following question was certified: "Whether or not Judiciary Law § 753-a(1), or Labor Law § 808, or Article I, Section 2 of the Constitution of the State of New York, or the 14th Amendment of the United States Constitution guarantees the right to a jury trial in a criminal contempt proceeding for an alleged violation of a Court order made pursuant to Civil Service Law § 211."

Ralph R. Katz, Ernest Fleischman, Stephen F. Gordon and *Martin R. Ganzglass* for Albert Shanker and another, appellants. I. Section 753-a of the Judiciary Law and section 808 of the Labor Law give defendants the right to a jury trial. (*Brown* v. *State of Maryland*, 12 Wheat. [25 U. S.] 419; *Goodwins* v. *Hagedorn*, 303 N. Y. 300; *New York City Tr. Auth.* v. *Loos*, 2 Misc 2d 733, 3 A D 2d 740; *New York City Tr. Auth.* v. *Loos*, 9 Misc. 2d 492; *Manhattan & Bronx Surface Tr. Operating Auth.* v. *Quill*, 48 Misc 2d 1020; *People ex rel. Choate* v. *Barrett*, 121 N. Y. 678; *Matter of Savin*, 131 U. S. 267.) II. The Federal Constitution and decisions of the United States Supreme Court require that defendants be granted a jury trial in the contempt proceeding. (*Duncan* v. *Louisiana*, 391 U. S. 145; *Bloom* v. *Illinois*, 391 U. S. 194; *Cheff* v. *Schnackenberg*, 384 U. S. 373.) III. Under the Constitution of the State of New York defendants have a right to a trial by jury. (*Matter of Leary*, 175 Misc. 254; *Matter of Werner* v. *Reid*, 260 App. Div. 1000; *Matter of Leary*, 285 N. Y. 693; *People ex rel. Wood* v. *Draper*, 15 N. Y. 532.) IV. The denial of a jury trial to defendants would constitute a constitutional deprivation of the equal protection of the laws. (*Griffin* v. *Illinois*, 351 U. S. 12; *Rapid Tr. Corp.* v. *New York*, 303 U. S. 573; *Queensboro Farms Prods.* v. *Wickard*, 137 F. 2d 969.) V. A discrimination between private and public employees with respect to the right to a trial by jury for a contempt growing out of a labor dispute is a denial of equal protection of the laws because there is no reasonable and just relationship between such a distinction and the purpose of the provision establishing the right to a trial by jury. (*Morey* v. *Doud*, 354 U. S. 457; *Myer* v. *Myer*, 271 App. Div. 465; *Thompson* v. *Shapiro*, 270 F. Supp. 331.)

Max H. Frankle, Everett E. Lewis and *Bernard Yaker* for Walter J. Degnan and others, appellants. I. The court below erred in denying defendants-appellants a jury trial on criminal contempt charges. (*Matter of Tonis* v. *Board of Regents*, 295 N. Y. 286; *New York State Bridge Auth.* v. *Moore*, 299 N. Y. 410; *Matter of Bailey* [*Bush Term. Co.*], 265 App. Div. 758, 291 N. Y. 534; *Dwight* v. *Enos*, 9 N. Y. 470; *People* v. *Dethloff*, 283 N. Y. 309; *Anderson* v. *Mather*, 44 N. Y. 249; *Owners & Tenants Elec. Co.* v. *Tractenberg*, 158 Misc. 677; *Matter of Hering* v. *Clement*, 133 App. Div. 293, 196 N. Y. 218; *People ex rel. Woodbury* v. *Hendrick*, 215 N. Y. 339.) II. The Federal Constitution mandates a jury trial in the criminal contempt proceeding herein. (*Duncan* v. *Louisiana*, 391 U. S. 145; *Bloom* v. *Illinois*, 391 U. S. 144; *United States* v. *United Mine Workers*, 330 U. S. 258.)

J. Lee Rankin, Corporation Counsel (*Frederic S. Nathan, William M. Murphy* and *Laurence D. Cherkis* of counsel), for respondent. I. Defendants' demands for a jury were properly rejected in a criminal contempt trial for willful disobedience of a court order issued pursuant to the Taylor Act enjoining a strike by public employees against the Government. (*Dyke* v. *Taylor Implement Co.*, 391 U. S. 216; *DeStefano* v. *Woods*, 392 U. S. 631; *Bradley* v. *O'Hare*, 11 A D 2d 15; *Martin* v. *Curran*, 303 N. Y. 276; *Ostrom* v. *Greene*, 161 N. Y. 353; *Ex parte Wilson*, 114 U. S. 417; *People* v. *Bellinger*, 269 N. Y. 265; *Matter of McKinney* v. *Hamilton*, 282 N. Y. 393; *United States* v. *United Mine Workers*, 330 U. S. 258; *Jewish Hosp. of Brooklyn* v. *"John Doe"*, 252 App. Div. 581.)

Chief Judge FULD. These appeals require us to pass upon a fundamental question of high importance in connection with the enforcement of the provisions of the recently enacted Taylor Law (L. 1967, ch. 392; Civil Service Law, art. 14, §§ 200–212). Are public employees or the unions which represent them entitled, as a matter of right, to trial by jury in a criminal contempt proceeding brought against them for alleged violation of section 210 (subd. 1) of that statute, in that (as to the employees) they engaged in a strike and (as to the organizations) they instigated, encouraged or condoned such strike?

In the present case, the Corporation Counsel of the City of New York sought an order — pursuant to section 211 of the Civil Service Law and sections 750 and 751 of the Judiciary Law — to punish the defendants for criminal contempt, claiming that they had willfully disobeyed the restraining provisions of the temporary injunction issued by the Supreme Court on September 9, 1968. The defendants' demand for a trial by jury, based on their claim that they are entitled to such a trial as a matter of right by virtue of statutory and constitutional provisions, was rejected by Special Term, and its resulting orders were unanimously affirmed by the Appellate Division. The appeals are before us by leave of the latter court on certified questions.

The statutory provisions on which the several defendants rely are section 753-a of the Judiciary Law and section 808 of the Labor Law (formerly Civ. Prac. Act, § 882-a). Those sections, in substantially identical language, grant the right of jury trial in a proceeding to punish, as a criminal contempt, a failure or refusal to obey an injunction order granted "in any case involving or growing out of a labor dispute". It is urged by the defendants that the legislative design to apply those sections to strikes by public employees (§ 210, subd. 1) is demonstrated by the fact that, whereas the Legislature expressly provided that section 807 of the Labor Law[1] is inapplicable to injunctions to restrain violations of section 210 (subd. 1), no similar exclusionary language applies to section 808. We find no substance to this argument.

Our discussion of the statutory question may well begin by noting that a primary command to the judiciary in the interpretation of statutes is to ascertain and effectuate the purpose of the Legislature. In finding such purpose, one should look to the entire statute, its legislative history and the statutes of which it is made a part. (See, e.g., *Matter of Hogan* v. *Culkin*, 18 N Y 2d 330, 335; *Levine* v. *Bornstein*, 4 N Y 2d 241, 244; see, also, McKinney's Cons. Laws of N. Y., Book 1, Statutes, §§ 92, 95, 96, 97, 98, 111.)

1. This section restricts or limits the issuance of injunctions in "labor dispute" cases. Section 807 (formerly Civ. Prac. Act, § 876-a) and section 808 (formerly Civ. Prac. Act, § 882-a) are counterparts of the Norris-LaGuardia Act (47 U. S. Stat. 70; U. S. Code, tit. 29, §§ 101-115; also U. S. Code, tit. 18, §. 3692).

Section 807 and section 808 of the Labor Law (as well as Judiciary Law, § 753-a) are but the identically worded successors of a statutory provision enacted in the 1930s which constituted this State's Little Norris-LaGuardia Act (Civ. Prac. Act, § 876-a), named for its Federal prototype, the Norris-LaGuardia Act (47 U. S. Stat. 70; U. S. Code, tit. 29, §§ 101–115). Accordingly, in determining the reach of the new statutes, we find it highly significant that for the past three decades their predecessors have been held inapplicable to public employees. More specifically, the courts have ruled that such provisions—both those restricting or limiting the issuance of labor injunctions and those granting the right of trial by jury in criminal contempt proceedings involving labor disputes—apply solely to employees in private industry and not to those in public employment. (See *United States* v. *Mine Workers*, 330 U. S. 258, 298; *Jewish Hosp. of Brooklyn* v. "*John Doe*", 252 App. Div. 581, 585; see, also, *New York City Tr. Auth.* v. *Loos*, 2 Misc 2d 733, 742, affd. 3 A D 2d 740; *New York City Tr. Auth.* v. *Loos*, 9 Misc 2d 492, 493.) It is overly simplistic reasoning to assume that the Legislature, in excluding the provisions of section 807 from the application of the Taylor Law, but failing similarly to mention section 808, intended to grant the right of trial by jury to public employees, a right which they had never previously possessed under the latter section.

If it had been the design of the Legislature to grant such a right, that body would undoubtedly have done so expressly and unequivocally. There is nothing in the provisions under consideration relating to jury trials (Labor Law, §§ 807, 808; Judiciary Law, § 753-a) which discloses any concern with, or application to, public employment. In point of fact, when we look to the legislative history which preceded and accompanied the enactment of the Taylor Law, there is no suggestion that any one, in or out of the Legislature, proposed trial by jury in contempt proceedings for its violation. It is inconceivable, we suggest, that so vital and salient a feature would not have been enacted, let alone not mentioned, by the Legislature if there had been any design or desire to provide therefor. To accept the position of our dissenting brothers would ascribe to the Legislature an intention not only to

override decisions on the books for upwards of 30 years, which denied the right to trial by jury to public employees (see *supra*, p. 115), but also to nullify the "old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect." (*United States* v. *Mine Workers*, 330 U. S. 258, 272, *supra*.)

The conclusion, therefore, is clear. The Taylor Law was never intended to, and does not, make provision for jury trials in contempt enforcement proceedings; the reference in the Taylor Law to section 807 cannot possibly create a right to a jury trial under section 808.

Nor do we find any basis for a claim that a denial of a jury trial in this case offends against any constitutional provision. Contrary to the defendants' contention, to refuse a trial by jury to public employees or their representative organizations and to grant it to those in private industry does not violate the equal protection of the laws under the Constitution of either the United States or New York State. Ever since the enactment of the Norris-LaGuardia Act and our State's Little Norris-LaGuardia Act, the view has been uniformly and consistently held that a legitimate distinction between public and private employment is constitutionally permissible. This has been recognized, we note, with regard not only to the prohibition against strikes but also to the issue, now confronting us, affecting jury trials. (See *United States* v. *Mine Workers*, 330 U. S. 258, 298, *supra*; *Jewish Hosp. of Brooklyn* v. *"John Doe"*, 252 App. Div. 581, 585, *supra*; see, also, *New York City Tr. Auth.* v. *Loos*, 2 Misc 2d 733, 742, affd. 3 A D 2d 740, *supra*; *New York City Tr. Auth.* v. *Loos*, 9 Misc 2d 492, 493, *supra*.) Indeed, the Supreme Court, explicitly dealing with the problem in the *Mine Workers* case — where the miners were governmental employees — declared (330 U. S., at p. 298):

> "Not only were the defendants fully informed that a criminal contempt was charged, but we think they enjoyed during the trial itself all the enhanced protections accorded defendants in criminal contempt proceedings. We need not treat these at length, for defendants, in this respect, urge only their right to a jury trial as provided in § 11 of the

> Norris-LaGuardia Act. But § 11 is not operative here, for it applies only to cases 'arising under this Act,' and we have already held that the restriction upon injunctions imposed by the Act do not govern this case. The defendants, we think, were properly tried by the court without a jury."

There is at least one vital reason why a jury trial is not appropriate or desirable in applying sanctions for violation of statutes regulating labor relations with public employees or their representative organizations. Prompt determinations, unencumbered by the long, drawn-out procedures involved in jury trials, are needed in criminal contempt proceedings under the Taylor Law in order to deter the continuance of paralyzing public strikes by visiting speedy punishment on the offenders.[2] It is not unreasonable to assume that the Legislature, which prohibited strikes by public employees, would provide every reasonable means for enforcement of that prohibition by giv-

2. Under the Judiciary Law (§ 751, subd. 2, par. [d], cl. [i]), a labor organization appealing an adjudication and fine for criminal contempt is not required to pay the fine until the appeal has been finally determined. Based on that provision, it is urged in the dissenting opinion of Judge KEATING (p. 133) that the Legislature sanctions delay in carrying out the punishment imposed on unions in such contempt proceedings and, hence — to quote from the dissent — "the purported justification [mentioned in the court's opinion] for denying a jury trial has no application at all." However, what the dissent overlooks is the further provision of the Judiciary Law (§ 751, subd. 2, par. [d], cl. [ii]) which, in order to reduce to a minimum delays due to appeals, requires the appellate courts to "grant a preference in the hearing thereof." No similar grace period pending appeal is granted to union leaders for commencement of imprisonment for contempt, and in at least one of New York City's recent major strikes in the public sector the leader was imprisoned during the continuation of the strike. That the Legislature intended the courts to utilize the criminal contempt proceedings as a means of promptly putting an end to illegal strikes by public employees is likewise apparent from the following statement contained in the Final Report (March 31, 1966) of the Governor's Committee on Public Employee Relations which led to the enactment of the Taylor Law (p. 43): "To this end [namely, the termination of illegal strikes in violation of section 210 of the Civil Service Law] we recommend that it may be made obligatory by law for specified law officers to initiate court action for injunctive relief before any strike breaks out as soon as it can be proven that it is about to occur, and if the resulting order or decree of the court is violated *to institute a criminal contempt proceeding promptly.*" (Emphasis supplied.)

ing the courts the powers necessary to bring about their early termination. Such strikes, if caused by firemen, could "overnight permit the destruction of a whole city", or if by policemen could "endanger the safety of millions of people and of all their possessions", or if called by sanitation workers could "almost overnight produce an epidemic threatening the lives of other millions of people." (Memorandum of Governor Dewey, approving Condon-Wadlin Act [L. 1947, ch. 391], N. Y. Legis. Ann., 1947, pp. 36–37.) And, we would add, if called by teachers in the New York City public school system, such strikes would not only deprive children of their fundamental and statutory right to a basic education — thereby severely handicapping them in their efforts to attain higher education and future employment — but it would also impair their respect for law.

Strikes by employees in certain private industries may, as Judge KEATING notes in dissent (opn., p. 134), be just as paralyzing in their impact upon the public as strikes by workers in public employment. But the Legislature has not seen fit to legislate with regard to such strikes.[3] And, just as a classification is not deemed unreasonable which differentiates between strikes by public employees and employees in private industry,[4]

3. Our Legislature, distinguishing between "private" and "public" employees, has refrained from enacting laws prohibiting strikes — which might have a crippling effect on a city — by employees of private utilities, privately owned railroads, shipping lines and other similar private industries. The Legislature's failure to act in the private sector is undoubtedly due to the fact that such provisions might conflict with Federal legislation, such as the National Labor Relations Act (U. S. Code, tit. 29, § 151 *et seq.*) and the Railway Labor Act (U. S. Code, tit. 45, § 151 *et seq.*) and might thereby violate the exclusive primary jurisdiction of Federal administrative agencies vested with the authority to deal with such matters. (See, e.g., *San Diego Unions* v. *Garman*, 359 U. S. 236.)

4. The policy reasons for distinguishing between public and private employees are succinctly set forth in the afore-mentioned Final Report of the Governor's Committee on Public Employee Relations (pp. 18-19): "Careful thought about the matter [that is, the distinction between strikes by public and private employees] shows conclusively, we believe, that while the right to strike normally performs a useful function in the private enterprise sector (where relative economic power is the final determinant in the making of private agreements), it is not compatible with the orderly functioning of our democratic form of representative government (in which relative polical power is the final determinant)."

so a classification may not be subjected to attack which denies a jury trial to public employees whose willful defiance of the prohibition against strikes, if not brought to an immediate end (without the delay occasioned by possibly long, drawn-out jury trials), might cripple a city. As the Supreme Court not too long ago had occasion to observe (*McGowan* v. *Maryland*, 366 U. S. 420, 425–426):

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. *The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective.* State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (Emphasis supplied.)

Certainly, a reasonable distinction may be drawn between public and private employment; reasonableness of a classification under constitutional standards is always influenced by time and circumstances. It is sufficient to note that, as of the present, legislative differentiation between public and private employees, insofar as restrictions on their right to strike and to jury trials are concerned, is reasonable.

The defendants' further contention that the Federal Constitution (art. III, § 2; 5th, 6th, 14th Amdts.) requires that they be accorded a trial by jury is likewise without merit. *Bloom* v. *Illinois* (391 U. S. 194), contrary to the defendants' argument, does not stand for the proposition that the Fourteenth Amendment guarantees the right to a jury trial in every contempt proceeding in State courts. The decision in *Bloom* is plainly limited in its application to "serious" crimes in contradistinction to "petty" offenses (e.g., p. 197; see, also, *Dyke* v. *Taylor Implement Co.*, 391 U. S. 216, 220; *DeStefano* v. *Woods*, 392 U. S. 631, 633). In the *Dyke* case (391 U. S. 216, *supra*), for instance, the Supreme Court, after observing that it had not drawn a precise line "between punishments that can be

considered ' petty ' and those that cannot be ", went on to say that " it is clear "—from its decision in *Cheff* v. *Schnackenberg* (384 U. S. 373)—" that a six-month sentence is short enough to be ' petty.' " In the case before us, it is sufficient to point out that the maximum punishment to which the individual defendants are subject—if found guilty—is 30 days in jail and a fine of $250 (Judiciary Law, § 751, subd. 1).

Nor does the penalty to which defendant unions are subject—a fine of $10,000 a day or one fifty second (1/52) of the total amount of annual membership dues, " whichever is the lesser " (Judiciary Law, § 751, subd. 2, par. [a])[5]—render the contempt a " serious " crime. The determination, whether it is serious or petty under the decisions, turns not on the amount of the fine which may be imposed but solely on the length of the prison sentence. (See *Ex parte Wilson*, 114 U. S. 417, 428; *People* v. *Bellinger*, 269 N. Y. 265, 271; *Matter of McKinney* v. *Hamilton*, 282 N. Y. 393, 397.) Consequently, as the cases reveal, the fine, even though sizeable in amount,[6] furnishes no valid criterion for the defendants' claim that the contempt charged against them constitutes a serious crime. Further, even if the amount of the permissible fine had any relevance, the fine—which in the last analysis must be borne by the union membership (see, e.g., *Martin* v. *Curran*, 303 N. Y. 276, 281)—is actually small, amounting, at most, to no more than a member's weekly union dues for each day of the contempt.

In sum, then, we find that no constitutional or statutory right of the defendants will be transgressed by a trial of the criminal contempt charge without a jury.

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5. It is also asserted that, in dealing with the question whether a serious crime is here involved, this court should consider that the labor organizations may be compelled to forfeit their membership dues deduction privileges for a period not to exceed 18 months (Civil Service Law, § 210, subd. 3 par. [f]). Since no action has been taken by any governmental official, as required by section 210 of the Civil Service Law, and none can result from the present contempt proceedings, the fact that such forfeiture may occur at some future date has no relevance to the question now before us.

6. It should be noted, in passing, that, although a fine of $700,000 was imposed on defendant labor organization in *United States* v. *Mine Workers* (330 U. S. 258, *supra*), the Supreme Court held that the defendant had no right of trial by jury. And in *Cheff* v. *Schnackenberg* (384 U. S. 373, *supra*), a demand for a jury trial was held properly denied in a criminal contempt case even though one of the defendants had been fined $100,000.

The orders appealed from should be affirmed, without costs, and the questions certified answered in the negative.

BURKE, J. (dissenting). The order seeking to place these defendants in contempt is predicated on the Public Employees' Fair Employment Act, more popularly known as the Taylor Act (Civil Service Law, §§ 200–212), and article 19 of the Judiciary Law (Judiciary Law, §§ 750–781). Section 210 of the Taylor Act specifically provides that a public employee who condones, causes or instigates a strike " shall be subject to the disciplinary penalties provided by law for misconduct, *in accordance with procedures established by law.*" (Civil Service Law, § 210; emphasis added.) Such procedures are contained in the Judiciary Law and Labor Law. The defendants have demanded a trial by jury in this matter, contending that such a trial is available to them as a matter of right by virtue of various statutory provisions (Judiciary Law, § 753-a; Labor Law, § 808), and that a denial of a trial by jury would be unconstitutional. For the reasons stated below, I am of the opinion that a trial by jury is mandated in this instance.

In support of their contention that they have a statutory right to a trial by jury, defendants rely in part upon section 753-a of the Judiciary Law. It is there stated, in clear and unequivocal terms, that: " Notwithstanding any inconsistent provision of law, where the alleged contempt is punishable under section seven hundred fifty and/or section seven hundred fifty-three and arises out of a failure or refusal to obey any mandate of a court contained in or incidental to an injunction order granted by such court in any case involving or growing out of a labor dispute, no punishment, prescribed by either of such sections, shall be meted out except after a trial by jury to which the defendant shall be entitled as a matter of right ". Whether that provision is here applicable depends on three factors: first, is the contempt here punishable under either of the above-mentioned sections; second, did this injunction involve or grow out of a labor dispute; finally, is the punishment sought prescribed by either section. Since the order seeking to place these defendants in criminal contempt is predicated on section 750 of the Judiciary Law, it is axiomatic that the first and third requirements of section 753-a are indeed satisfied in this case. The sole basis for denying a jury trial under this section is to

conclude that the injunction involved did not arise from a labor dispute.[1] The court below has relied upon decisions from lower courts in this State which, while construing other statutes in a different era, have held that there can be no labor dispute within the meaning of particular statutes where public employees are involved. Since it is not disputed that, absent such an interpretation of section 753-a, the court would determine that a labor dispute did in fact exist in this situation, I merely conclude that under section 753-a of the Judiciary Law defendants are given an unqualified right to a trial by jury in this instance, *notwithstanding any inconsistent provisions of law.*

A parallelism is drawn between section 753-a of the Judiciary Law and sections 807 and 808 of the Labor Law in an effort to sustain the contention of the Corporation Counsel that a "labor dispute" cannot exist under the Judiciary Law, when public employees are involved. Sections 807 and 808 of the Labor Law comprise an article in themselves entitled "Injunctions in Labor Disputes". Of these two sections, only 807 has been held not to apply to public employees; the one case purporting to reach that same conclusion under section 808 does so merely by dictum, has never been followed, and was not the source of any significant commentary. (*New York City Tr. Auth.* v. *Loos*, 9 Misc 2d 492.)

Section 807 provides in effect that no injunction or restraining order involved in or growing out of a labor dispute shall be issued until a hearing has been held. This section's predecessor, like the predecessor of section 753-a of the Judiciary Law, was enacted in 1935. Shortly thereafter, the New York Labor Relations Act was enacted. (Labor Law, §§ 700–716.) In that act, the Legislature specifically declared that its provisions were not to apply to either public employees or employees of nonprofitmaking hospitals (Labor Law, § 715). The very year

1. Labor dispute, within the meaning of section 753-a, is defined in that section in the following manner: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee."

that act was enacted, the Appellate Division had before it the case of *Jewish Hosp. of Brooklyn* v. "*John Doe*" (252 App. Div. 581), wherein the sole question was whether the predecessor of section 807 applied to a charitable corporation such as the Jewish Hospital. The court in holding 807 inapplicable began by summarizing the various maxims of construction pertaining to the State and its political subdivisions to show that section 807 might not apply as these entities were not specifically included, despite the statute's encompassing terms. The court proceeded by demonstrating how the legislative purpose behind granting a hearing prior to the issuance of a restraining order had no relation to charitable corporations and their employees. Finally, the court relied upon the provisions in the Labor Relations Act. "Both statutes should be read together and reconciled as far as possible in an effort to read the mind of the Legislature. [Citations omitted.] In enacting both statutes the Legislature recognized labor's right to strike and to resort to peaceful picketing and other lawful activities free from interference by the courts * * * The Labor Relations Act —unlike the instant statute—expressly provides it shall not apply 'to employees of the State * * * or to employees of charitable, educational or religious associations or corporations'" (252 App. Div. 581, 586). This same rationale produced a similar decision in *New York City Tr. Auth.* v. *Loos* (2 Misc 2d 733): "The procedural requirements of section 876-a of the Civil Practice Act [now Labor Law, § 807] have no application to these public employees. Also, the individual defendants plainly have no rights under the State Labor Relations Law for section 715 of the Labor Law specifically provides that such act shall not apply to public employees generally [citations omitted]" (p. 742). Finally, in a recent decision involving the biennial confrontation with the Transport Workers Union, it was stated: "It has been settled that 'public employees' can and should be enjoined from striking and that the provisions of section 807 are not applicable to such employees." (*Manhattan & Bronx Surface Tr. Operating Auth.* v. *Quill*, 48 Misc 2d 1021, 1022.)

Each of these decisions is inapplicable to the present litigation. Each decision recognizes that, where employees are prohibited from striking, it is indeed improvident to require a time-

consuming hearing before a restraining order may be issued against the acknowledged illegal strike. Thus, it is no mere accident that the Legislature, in enacting the Taylor Act, devoted a separate section to the application for injunctive relief. (Civil Service Law, § 211.) This new section not only reflects the holdings of the cases mentioned above but is also compatible with the general purpose of the act—"to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government." (Civil Service Law, § 200.) It does not follow, the cases do not so hold, and the Taylor Act does not so provide, that the public interest is also served by denying public employees the right to a trial by jury. Moreover, before the Taylor Act was adopted, the Legislature, in 1963, made several amendments to the State Labor Relations Law, with the explicit intention of conferring rights upon the employees in nonprofitmaking hospitals. (See, e.g., Labor Law, §§ 715–716.) Thus, the underlying reason for the rule in both *Jewish Hospital* and *Loos* (*supra*) has been overturned by the Legislature, and the decisions have been effectively overruled. It is, therefore, error to declare, as the court below has done, that since the Legislature "must have been aware of the prior judicial interpretation of those sections as not embracing disputes involving public employees, the Legislature may be taken to have acquiesced in that interpretation."[2]

Section 808 of the Labor Law is admittedly similar in language to section 753-a of the Judiciary Law. This marked uniformity between the statutes, when coupled with the decision in *New York City Tr. Auth.* v. *Loos* (9 Misc 2d 492, *supra*), is said to provide a precedent for the denial of the trial by jury in this case. In *Loos*, the court stated that neither section 808 nor

2. *United States* v. *Mine Workers* (330 U. S. 258), relied upon by the majority in this case involving the Taylor Act, dealt only with the Norris-LaGuardia Act and had no direct bearing on any of the decisions of the New York courts discussed above. As I will indicate later, the Supreme Court's decision was limited in its scope, and clearly failed to consider the question of equal protection of the law. Moreover, the defendants in that case waived the right to an advisory jury (*supra*, p. 268). It is also significant that the one short passage set forth in the majority opinion includes the entire discussion of trial by jury albeit the opinions therein exceeded 120 pages.

section 753-a confers a right to a trial by jury where the "labor dispute" is between public employees and their government. However, in that case, the court concluded that there was no evidence on which the defendant could be adjudged guilty of contempt. Hence, the question of whether a jury trial was required, while discussed by that court, was not instrumental in the court's decision. Moreover, the sole basis for suggesting that there is no statutory basis for a jury trial for a contempt by public employees was the previous decision in *Loos*, which dealt with the necessity of a hearing prior to the issuance of a restraining order (2 Misc 2d 733, *supra*). As the Legislature in 1963 conferred rights upon certain public employees, thereby negating the holding in the first *Loos* decision, it follows that any extension of the *Loos* rationale was also negated. This is confirmed by an analysis of specific provisions of the Taylor Act.

The act begins by reciting that "The Legislature of the state of New York declares that it is the public policy of the state and the purpose of this act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government. These policies are best effectuated by (a) granting to public employees the right of organization and representation, (b) requiring the state, local governments and other political subdivisions to negotiate with, and enter into written agreements with employee organizations representing public employees". (Civil Service Law, § 200.) Following a section devoted to the definition of the terms of the act, there are two sections conferring upon the public employee the right to organize and the right to be represented for purposes of collective bargaining "with their public employers". (Civil Service Law, §§ 202, 203.) It is thus abundantly clear that the purpose of the Taylor Act was to enlarge the rights of public employees and to acknowledge the existence of an employer-employee relationship in the area of public employment. It is readily apparent that this new approach to the status of a public employee is totally inapposite to the philosophy prevailing at the time of the *Loos* and *Jewish Hospital of Brooklyn* decisions. It is undisputed that the Taylor Act acknowledges the applicability of the

Judiciary Law when injunctions are to be enforced. "If an order of the court enjoining or restraining such violation does not receive compliance, such chief legal officer shall forthwith apply to the supreme court to punish such violation under section seven hundred fifty of the judiciary law." (Civil Service Law, § 211.)[3] It is apparent that this reference to the Judiciary Law was directed to all of article 19. It is also apparent, from all of the above, that the injunction in this case is one "involving or growing out of a labor dispute" within the meaning of section 753-a of the Judiciary Law. The alternative conclusion, adopted today, implies that the Legislature in enacting the Public Employees' Fair Employment Act intended section 753-a of the Judiciary Law to apply to that act, except where public employees are involved.

The Taylor Law, through its reference to the Judiciary Law, clearly intended that public employees and their representatives should have the right to a trial by jury in the present situation. Just as the amendments to the Labor Relations Law evidence an intent to increase the rights of employees in charitable hospitals, the purpose of the Taylor Act, as expressed therein, demonstrates an enlightened approach toward employer-employee relations in this area. Here, as in *Jewish Hosp. of Brooklyn* v. *"John Doe"* (252 App. Div. 581, 586, *supra*), "Both statutes should be read together and reconciled as far as possible in an effort to read the mind of the Legislature."

The majority proffers many reasons why a jury trial may not be appropriate or desirable in this case. Thus, referring in part to the legislative history of an act since repealed, we are told that a jury trial might precipitate "the destruction of a whole city", "endanger the safety of millions", and "produce an epidemic". I do not comprehend how the mere presence of a jury in a criminal contempt case can cause such disaster. However, the reasons advanced by the majority do serve to

3. While section 211 merely refers to section 750 of the Judiciary Law, the Corporation Counsel concedes that subsequent sections were also intended to apply. As the majority quite properly indicates, the order in this case is sought under sections 750 and 751 of the Judiciary Law. It would indeed be overly simplistic reasoning on our part if we were to hold that reference to section 750 meant sections 750 and 751 only, but not sections 750, 751 and 753-a.

bring to mind the knowledgeable words of Mr. Justice HOLMES: "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment." (*Northern Securities Co.* v. *United States,* 193 U. S. 197, 400.)

Were this case to involve simply a question of statutory construction, it would be unnecessary to go beyond the analysis of the statutory provisions already discussed, since that analysis fairly compels the conclusion that those statutes provide for a jury trial of a criminal contempt alleged to have been committed by public employee unions and their officers. But, an additional issue is raised by the contrary construction of those statutes. The issue is of a constitutional dimension since it involves a purported statutory discrimination between public and private employees in relation to their respective rights to such a jury trial. Initially, it should be emphasized that public employees, qua public employees, are not to be regarded as inhabitants of a constitutional limbo in which they are relegated to a "watered-down version of constitutional rights." (*Garrity* v. *New Jersey,* 385 U. S. 493, 500; *Keyishian* v. *Board of Regents,* 385 U. S. 589.) Furthermore, this proposition remains true even in the face of the dire perils of strikes by public employees. A teacher no more forfeits his constitutional rights when it is alleged that he is engaged in an illegal strike than does any individual citizen forfeit them when it is alleged that he has committed some heinous crime. We harbor no doubts as to the very serious character of the threat to the public inherent in strikes by public employees. It is precisely in times when the public interest is so seriously threatened that courts must heed the caution voiced by Chief Judge CARDOZO: "Historic liberties and privileges are not to bend from day to day 'because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment' * * * are not to change their form and content in response to the 'hydraulic pressure' * * * exerted by great causes." (*Matter of Doyle,* 257 N. Y. 244, 268, quoting HOLMES, J., in *Northern Securities Co.* v. *United States,* 193 U. S. 197, 400–401.) Suffice it to say that the issue here is whether the

defendants have a statutory right to a jury trial and the major consideration in arriving at a negative conclusion on that issue is the constitutional infirmity of such a conclusion and the emphasis on the perils of public employee strikes merely serves to becloud the true issue to be resolved here.

Both the United States (14th Amdt.) and the New York State Constitutions (art. I, § 11) provide that no person shall be deprived of the equal protection of the law. Cases too numerous for citation have applied this constitutional mandate in a wide variety of situations and the United States Supreme Court has succinctly stated the applicable criteria: "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended *only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective* * * * A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (*McGowan* v. *Maryland*, 366 U. S. 420, 425–426; emphasis added.) The emphasized portion of that opinion succinctly states the constitutional infirmity flowing from the majority's construction of the statutes so as to deny defendants a right to trial by jury. Although it is true, as the majority states (p. 116), "that a legitimate distinction between public and private employment is constitutionally permissible", it must be borne in mind that a classification which is constitutionally impeccable for one purpose may be constitutionally infirm for another (*Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150). Thus, a classification of unions and their members in terms of their employment in the public, as against the private, sector may well be reasonably related to a legislative objective of prohibiting strikes which interfere with essential public services. We are here faced, however, not with legislation barring strikes by public employees, but with legislation which, *as construed*, denies a jury trial in a criminal contempt proceeding against public employees arising from the alleged violation of a court order issued in a labor dispute with a governmental employer, but which grants such a jury trial to employees in the private sector who are also charged with violating a court order. Each is charged with the same violation and the fact

that one is employed by the Board of Education, while the other is employed by some private educational system or institution, has no bearing whatever on the procedural method by which his accountability for the alleged violation is to be determined. Is there any governmental interest which requires that the Board of Education employee have his guilt or innocence determined by a Judge without a jury, whereas the employee of the private educational system or institution may have his guilt or innocence determined by a jury? No such interest has been demonstrated in this case and characterizations of the jury-trial process as "long" and "drawn-out" cannot serve to supply such an interest.[4] Furthermore, in terms of the time and circumstances within which it is insisted this legislation must be viewed, it is clear that this is a time when the right to a jury trial is increasingly being recognized as being "fundamental to the American scheme of justice" (*Duncan* v. *Louisiana*, 391 U. S. 145, 149). In view of this, is it reasonable to ascribe to the Legislature an intent to sacrifice such a fundamental aspect of our system of justice to the demands of expedience? So, too, the circumstances of the recent history of public employer-employee labor relations would seem to indicate that the legislators, as practical, realistic men, realized that the very resort to the court and its process in such situations often tends to exacerbate and inflame an already critical situation and has even, in the recent past, itself become a key obstacle to the resolution of such disputes and the re-establishment of the sought-after harmony and co-operation between public employers and their employees. In the face of these facts, is it reasonable to say that the Legislature could reasonably have concluded that the withholding of a right so universally recognized as an integral part of our system of administering justice would *hasten* the end of such public employee labor disputes? The time and the circumstances provide a rather clear-cut answer to that question. The conclusion is inescapable that, in the language of *McGowan* (*supra*), the distinction between public and private employees, in the context of the right to jury trial, is "wholly irrelevant" to the

4. Indeed, at least as to the fine which may be imposed, the Legislature disclaimed any overwhelming desire for swift punishment by providing that it need not be paid until an "appeal is finally determined." (Judiciary Law, § 751, subd. 2, par. [d], cl. [i].)

achievement of the legislative objectives expressed in the Taylor Act. (Cf. the equal protection analysis in *Barstrom* v. *Herold*, 383 U. S. 107, 111-112.) Indeed, the legislative objectives sought to be achieved by the enactment of the Taylor Act are not difficult to establish since the Legislature saw fit to verbalize its objectives in the statute itself: "The legislature of the state of New York declares that it is the public policy of the state and the purpose of this act *to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of the government.*" (Civil Service Law, § 200; emphasis added.) It is difficult, if not impossible, to conceive of any way in which the *denial* of a jury trial, in a criminal contempt proceeding brought against a public employees' union and its officers and arising from a dispute with a governmental employer, is in any way relevant to or productive of harmony and co-operation or how it could possibly be relevant to the assurance of the orderly and uninterrupted operations and functions of the government. The issue involved goes merely to the *procedure* to be invoked when a labor dispute has already occurred and has resulted in a court order which has allegedly been violated and simply has no bearing whatever on the effectuation or frustration of the expressed legislative objectives. This is particularly apparent when it is recognized that the matter of jury trial arises only *after* events have occurred which necessitate a resort to the court and its mandates in an effort to enforce compliance which has allegedly not been voluntarily forthcoming. Nor is it conceivable that the *denial* of such a right, especially when it is *granted* in criminal contempt proceedings arising from private labor disputes, could effectuate the objectives of harmony and co-operation and uninterrupted government operations in the future. Governmental entities can show no vital or even non-vital interest which will be served by denying these defendants a jury trial. In the face of the obvious lack of relevant connection between the public private employee distinction as to the right to a jury trial and the objectives sought to be achieved by the legislation of which the denial of a right to jury trial is purportedly a part, there is a rather clear-cut deprivation of the equal protection of the law to which *both* public and private

employees are entitled. It should need no citation of case or treatise to establish the proposition that a particular enactment, at the time it is challenged, either meets or does not meet the requirements of the fundamental document under which it must find its ultimate validity. Either the statutes involved in this case, *as construed*, accord public employees the equal protection of the law or they deprive public employees of such equal protection.

In light of the serious constitutional deprivation of equal protection involved in the majority's construction of these statutes, it is difficult to understand why some rather fundamental canons of statutory construction were apparently ignored in arriving at that construction. While we recognize that the "primary command to the judiciary in the interpretation of statutes is to ascertain and effectuate the purpose of the Legislature", we also recognize that "A construction of a statute is favored which makes it operate equally on all classes of persons and avoids unjust discrimination." (McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 147; *Matter of Meyer*, 209 N. Y. 386.) The mere comparison of the respective rights of the public and private employee resulting from the majority's construction amply demonstrates that this canon played no part in that construction. Even more critically in point is the canon which asserts that "statutes must be construed to avoid not only the conclusion that they are unconstitutional, but also to avoid any grave doubts upon that score." (McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 150; *Courtesy Sandwich Shop* v. *Port of N. Y. Auth.*, 12 N Y 2d 379, 389; *Matter of Coates*, 9 N Y 2d 242, 253; *Matter of Vanderbilt*, 281 N. Y. 297, 313.) Even assuming, *arguendo*, that the majority's construction of the statutes so as to deny the public employee the right to a jury trial of a criminal contempt is supportable simply as a matter of construction, the resulting constitutional infirmity of that construction requires that the court implement these canons to obviate those infirmities. It is axiomatic that the Judiciary should take great care in ascribing a particular intent to the Legislature in enacting a particular statute. It is equally axiomatic that such care should be redoubled when the intent sought to be ascribed to the Legislature carries with it a burden of unconstitutionality. The lack of such care is

acutely apparent here since there is available to the court a construction which is eminently reasonable, if not compelled, as well as free from constitutional objections.

Since we find that the defendants are entitled to a jury trial under the statutes of this State and since a contrary construction of those statutes raises a grave constitutional question as to the deprivation of the equal protection of the law, we would reverse the orders of the Appellate Division which affirmed the denial of appellants' right to a jury trial.

Accordingly, the orders of the Appellate Division should be reversed and the certified questions should be answered in the affirmative.

KEATING, J. (dissenting). Although I concur in most of Judge BURKE's opinion and would construe the Taylor Law as granting a right to trial by jury here in order to avoid reaching a serious constitutional question (*Kent* v. *Dulles*, 357 U. S. 116), I prefer to rest my dissent primarily on the constitutional mandate involved. In light of the majority's treatment of this point, I find it desirable to outline briefly the basis of my conclusion that, even if the Taylor Law does not provide a right to trial by jury to the appellants, the "equal protection" clause of the Fourteenth Amendment does.

The "equal protection" clause stands as a guardian and protector of minorities of every kind against every form of irrational discrimination. It is manifestly far easier, politically, to pass legislation which touches adversely only a small group. The "equal protection" clause seeks to control this tendency by requiring the Legislature to extend its classification to all persons or groups fairly within the legislative policy. Justice JACKSON in his concurring opinion in *Railway Express* v. *New York* (336 U. S. 106, 112-113) recognized this fundamental purpose of the "equal protection" clause when he wrote: "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation

and thus to escape the political retribution that might be visited upon them if larger numbers were affected."

Later on in the opinion he summarized his views in a particularly apt phrase: "[W]e are much more likely to find arbitrariness in the regulation of the few than of the many." (336 U. S., p. 113). I would examine the issue raised by this appeal in light of Justice JACKSON's analysis of the "equal protection" clause.

In the case upon which the majority rely (*United States* v. *Mine Workers*, 330 U. S. 258, 298), the "equal protection" point was not even raised. Moreover, the case was decided in a day when the importance of the "equal protection" clause, as a vital tool in the preservation of a just society, was only then beginning to be felt.

The question is not whether public employees differ from private employees or whether the former may not strike, while the latter may, but whether the differences between them are pertinent to the subject with respect to which the classification is made, to wit, the right to trial by jury (*Baxstrom* v. *Herold*, 383 U. S. 107, 111). More precisely, the issue here is whether the denial of a jury trial is necessary to the functioning of the Taylor Law. The "one vital reason" offered by the majority to justify the lack of a jury trial requirement, where public employees or their representative organizations are involved, is an alleged need for "Prompt determinations" "in criminal contempt proceedings under the Taylor Law" "unencumbered by the long, drawn-out procedures involved in jury trials" "in order to deter the continuance of paralyzing public strikes by visiting speedy punishment on the offenders." (Majority opn., p. 117.) In contrast to almost every other criminal statute, however, the Taylor Law postpones the enforcement of all of its penalties against the union until after all appeals are exhausted (Judiciary Law, § 751, subd. 2, par. [d], cl. [i]). While it is conceivable that the appellate process could terminate prior to the end of the strike, this has yet to happen. Therefore, in the case of the union, the purported justification for denying a jury trial has no application at all.

In the case of the short jail terms provided by the statute as punishment against union leaders, and which can be imposed immediately, it is of crucial significance that, in three major strikes against the City of New York since the Taylor Law

was enacted, the city found it impossible effectively to enforce the short jail sanction to end the strikes.* The same situation prevailed for 20 years under the Condon-Wadlin Act (L. 1947, ch. 391). Therefore, while the Legislature has the right to experiment, we are here dealing with a situation where the reasons offered for drawing the distinction have been shown by historical precedent to have no basis.

When it is remembered that employees of private utilities have the power to plunge one of the great cities of the world into total darkness or complete silence, that employees of privately owned railroads and shipping lines have the power to deprive the residents of that city of vital food and fuel, that private sanitation workers, who carry away a substantial portion of the refuse in New York City, have the power to endanger the health of millions of its inhabitants and that thousands of other workers, carrying out activities vital to the life and safety of the city, may demand a trial by jury if they are charged with violation of a court order restraining a strike, the fallacy in the reasoning which would deny a jury trial to these defendants is readily exposed. References to the dangers to the children from the teachers' strike, real as those dangers may be, are not a substitute for a penetrating analysis of the labels "public" and "private" employees. In my view, the "public"-"private" distinction cannot be maintained as a constitutionally viable difference with respect to the right of a jury trial.

Judges SCILEPPI, BREITEL and JASEN concur with Chief Judge FULD; Judge BURKE dissents and votes to reverse in an opinion in which Judges BERGAN and KEATING concur, Judge KEATING in a separate opinion in which Judges BURKE and BERGAN also concur.

Orders affirmed, etc.

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*The majority opinion argues (n. 2) that in a recent strike in the public sector a union leader was imprisoned for contempt during the course of the strike. What the argument overlooks is that the lack of a jury trial did not speed the end of the strike for in that case as well as others the strikes continued.

APPENDIX D

Opinion of Hon. Francis J. Bloustein, J.S.C.

SUPREME COURT

NEW YORK COUNTY

Special Term, Part I

Index No. 41675/1968

J. LEE RANKIN, Corporation Counsel of The City of New York, on behalf of THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Plaintiff,

vs.

ALBERT SHANKER, and Others, etc.,

Defendants,

ALBERT SHANKER and
UNITED FEDERATION OF TEACHERS, etc.,

Defendants.

BLOUSTEIN, *J.*:

The Corporation Counsel of the City of New York heretofore instituted an action for an injunction pursuant to section 211 of the Civil Service Law to restrain the defendants from engaging in a work stoppage and from conducting a strike against the New York City public school system. In this action, an order to show cause was issued

out of this court on September 9, 1968 temporarily restraining Albert Shanker, individually and as president, and other named officers and members of the United Federation of Teachers, Local 2, American Federation of Teachers, American Federation of Teachers, AFL-CIO, hereinafter referred to as UFT, an employee organization representing public school teachers generally, and Walter J. Degnan, individually and as president, and other named officers and members of the Council of Supervisory Associations, hereinafter referred to as CSA, from calling and continuing an illegal strike in violation of the Taylor Law (Civil Service Law, §§ 200-212).

In this proceeding, the Corporation Counsel of the City of New York seeks an order (Civil Service Law, § 211; Judiciary Law, §§ 750, 751) to punish the defendants for criminal contempt on allegations that they have wilfully disobeyed the restraining provisions of the temporary injunction heretofore issued by this Court on September 9, 1968. The defendants have demanded a trial by jury, claiming that such a trial is available to them as a matter of right in a case of this kind by virtue both of statutory provisions and constitutional mandate. The defendants' demand is opposed by the Corporation Counsel.

The statutory provisions on which defendants rely are section 753-a of the Judiciary Law and section 808 of the Labor Law (formerly Civ. Prac. Act, § 882-a). Those sections, in practically identical language, grant the right of jury trial in a proceeding to punish, as a criminal contempt, a failure or refusal to obey an injunction order granted "in any case involving or growing out of a labor dispute."

There is no question but that those provisions operate to grant the right of jury trial in criminal contempt pro-

ceedings arising out of injunctions granted in labor disputes involving employees in the private sector of employment. (See, George F. Stuhmer & Co. v. Korman, 252 App. Div. 878.) The courts as well as the Legislature have, however, traditionally differentiated, in the area of employer-employee relations, between public and non-public employees. (See Pruzan v. Board of Education of the City of New York, 25 Misc 2d 945, 950, affd. 12 A D 2d 923, affd. 9 N Y 2d 911; Matter of Di Maggio v. Brown, 19 N Y 2d 283, 288; United States v. United Mine Workers, 330 U. S. 258, 269-276.)

The statutory provisions on which the defendants here rely in support of their demand for a jury trial were originally enacted in 1935 (Laws 1935, chs. 298, 299), which amended the then Civil Practice Act section 882-a and added section 753-a to chapter 35 of the Laws of 1909, now in the Judiciary Law. At the same session of the Legislature companion provisions were adopted restricting the issuance of injunctions "in any case involving or growing out of a labor dispute" (Labor Law, § 807, formerly Civ. Prac. Act, § 876-a, added by Laws 1935, ch. 477). It is further significant that the term "labor dispute" is defined in practically the same language in these several related provisions (see Labor Law, § 807, subd. 10; *id.*, § 808, subd. 2; Judiciary Law, § 753-a, subd. 2).

In cases involving strikes by public employees in violation of the Condon Wadlin Law (former Civil Service Law, § 108), since superseded by the Taylor Law (Civil Service Law, art. 14), it was held that a strike by public employees was not within the ambit of the statutory provisions restricting the issuance of an injunction in a case arising out of "a labor dispute" (Labor Law, § 807 and that injunctions could be granted in such cases without

regard to those restrictions (New York City Transit Authority v. Loos, 2 Misc 2d 733, 742, affd. 3 A D 2d 740; Manhattan & Bronx Transit Authority v. Quill, 48 Misc 2d 1021, 1022). The United States Supreme Court has similarly held that the broad provisions of the Norris-La Guardia Act, limiting the issuance of injunctions by Federal courts in labor disputes, are inapplicable to disputes between the Federal Government and its employees (United States v. United Mine Workers, *supra,* 330 U. S. at 269-280).

On the basis of the foregoing interpretation of the term "labor dispute" in section 807 of the Labor Law, as not embracing a dispute involving public employees, it was thereafter held, in a case arising under the former Condon-Wadlin Law, that the related provisions of section 808 of the Labor Law (then Civ. Prac. Act, § 882-a), and section 753-a of the Judiciary Law, granting the right of jury trial in a criminal contempt proceeding arising out of a "labor dispute," were likewise inapplicable to a dispute involving public employees, and that there was no right of jury trial in a criminal contempt proceeding arising out of a dispute affecting public employees (New York City Transit Authority v. Loos, 9 Misc 2d 492, 493).

As part of its enactment of the Taylor Law, the Legislature amended section 751 of the Judiciary Law in relation to the punishment to be imposed for criminal contempt on an employee organization representing public employees (Laws 1967, ch. 392, § 3). This later-enacted statute nevertheless left unchanged the provisions of section 753-a of the Judiciary Law and section 808 of the Labor Law. Since it must have been aware of the prior judicial interpretation of those sections as not embracing disputes involving public employees, the Legislature may be taken to have ac-

quiesced in that interpretation. (See Buduson v. Curtis, 285 App. Div. 517, 519, affd. 309 N. Y. 879; cf. RKO-Keith-Orpheum Theatres v. City of New York, 308 N. Y. 493, 500.)

Furthermore, the Taylor Law evinces a clear legislative purpose to accord special treatment to the public sector of employment, as distinguished from the private sector. Indeed, one of the new provisions added by the 1967 amendment to section 751 of the Judiciary Law (subd. 2[a]) provides that, in fixing the quantum of punishment to be imposed on an employee organization of public employees found to be guilty of criminal contempt, the court shall consider, among other things, "the extent of the wilful defiance of or resistance to the court's mandate." The evident implication is that the Legislature contemplated that the court, rather than a jury, would, as the trier of the facts in the criminal contempt proceeding, determine whether there had been any "wilful defiance of or resistance to the court's mandate" and would thus be in a position to take into account the extent of such defiance or resistance in fixing the punishment to be imposed.

It accordingly seems clear that the defendants have no right of jury trial by virtue of any statutory provisions therefor. The question remains whether they have a constitutional right to such a trial.

On the latter question, the defendants rely primarily on the recent decisions of the United States Supreme Court in Duncan v. Louisiana (391 U. S. 145); Bloom v. Illinois (391 U. S. 194) and Dyke v. Taylor Implement Mfg. Co. (391 U. S. 216). In *Duncan,* the Court held that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases tried in state courts involving "serious crimes" as distinguished from "petty offenses." The Court declared that the basic criterion for differentiating between

the two classes of crimes was the severity of the punishment authorized therefor. In *Bloom* and *Dyke*, the Court held that the same rule was applicable to criminal contempt proceedings, and that there was a right of jury trial in such proceedings if the authorized punishment was comparable in severity to that provided for punishment of a "serious crime." The Court specifically approved its prior decision in Cheff v. Schnackenberg (384 U. S. 373) that there was no right of jury trial in a criminal contempt case in which the authorized punishment involved a prison term not exceeding six months. The Court did not attempt to draw the precise line between "serious crimes" and "petty offenses" and indeed "left open the question whether a contempt punishment by imprisonment for one year is, by virtue of that sentence, a sufficiently serious matter to require that a request for jury trial be honored. (See De Stefano v. Woods, 391 U. S. ——, 20 L. ed. 2d 1308, 1311.)

It is clear that the *Duncan-Bloom* doctrine cannot operate to entitle the individual defendants in this proceeding to a jury trial as a matter of constitutional right, since the maximum punishment which they could receive is imprisonment for thirty days and a fine of $250 (Judiciary Law, § 751, subd. 1). Obviously, the extent of such punishment is well within the six-month limit which the Supreme Court held to be unquestionably sufficient to bring the case within the category of a "petty offense."

It is urged, however, on behalf of the defendant employee organizations that the maximum punishment to which the organizations are subject is severe enough to take the case out of the category of a "petty offense," since such punishment may consist of a fine of $10,000 per day and the forfeiture of their check-off privileges for a period of up to eighteen months (Judiciary Law, § 751, subd. 2). The Court finds no merit in this position.

The primary emphasis in the *Duncan* and *Bloom* opinions, in discussing how severe the authorized punishment would have to be in order to qualify for the label of "serious crime," as distinguished from "petty offense," was on the imposition of a lengthy prison sentence. Indeed, in Cheff v. Schnackenberg, *supra*, the rationale of which was approved in Bloom, the Court had laid down a rule for the guidance of the Federal courts in contempt cases, under which a jury trial would be available as a matter of right only in contempt cases involving "sentences exceeding six months" (384 U. S. at 380). One of the defendants found guilty of contempt in the *Cheff* case, whose case was not before the Supreme Court, was a corporation which had been fined $100,000 (see 384 U. S. at 375). The Court in *Cheff*, nevertheless, in laying down a general rule for trials in Federal contempt cases, did not see fit to extend the right of jury trial to a contempt case involving a substantial fine, as distinguished from a lengthy term of imprisonment (see 384 U. S. at 380). See also United States v. United Mine Workers, *supra*, 330 U. S. at 298, where trial by jury was held not to be available in a Federal criminal contempt case in which a fine of $700,000 had been imposed against the defendant union and a fine of $10,000 against the union's president.

The New York Court of Appeals has similarly held that the criterion for determining whether a crime is serious enough to be denominated a "felony," rather than a "misdemeanor," is the length of the authorized prison sentence, and that punishment consisting merely of a fine, even one as substantial as $10,000, was not sufficient to render the offense a "felony" (Matter of McKinney v. Hamilton, 282 N. Y. 393, 397; People v. Bellinger, 269 N. Y. 265, 271).

Furthermore, the alleged severity of the fine here authorized to be imposed on an employee organization found guilty of contempt is not actually as great as defendants urge. The statute provides that the fine may be fixed in an amount equal to 1 52nd of the total amount of the organization's annual membership dues, for each day that the contempt persists, but not exceeding $10,000 per day (Judiciary Law, § 751, subd. 2). The authorized fine thus consists of one week's membership dues. Since the organization's liability to pay the fine is actually the liability of its individual members (cf. Martin v. Curran, 303 N. Y. 276, 281) and since the defendant organization appears to have a membership of over 50,000, the extent of the fine to which each individual member might be subjected is actually very small.

The defendants' demand for a jury trial is accordingly denied.

FRANCIS J. RIGGANBEE
J.S.C.

Dated: October 15, 1968

APPENDIX E

Judiciary Law of the State of New York, Section 753-a, 29 McKinney's Consolidated Laws of New York, p. 207

§ 753-a. Contempts in cases involving or growing out of labor disputes

1. Notwithstanding any inconsistent provision of law, where the alleged contempt is punishable under section seven hundred fifty and/or section seven hundred fifty-three and arises out of any failure or refusal to obey any mandate of a court contained in or incidental to an injunction order granted by such court in any case involving or growing out of a labor dispute, no punishment, prescribed by either of such sections, shall be meted out except after a trial by jury to which the defendant shall be entitled as a matter of right; provided, however, that this section shall not apply to any alleged contempt of such an injunction order committed in the presence of the court.

2. As used in this section and in subdivision three of section 215-30 of the penal law:

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation; or who are employees of one employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is between one or more employers or associations of employers and one or more employees or associations of employees; between one or more employers or associations of employers and one or

more employers or associations of employers; or between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee.

(c) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it and if he or it is engaged in the industry, trade, craft or occupation in which such dispute occurs, or is a member, officer or agent of any association of employers or employees engaged in such industry, trade, craft or occupation. Added L.1935, c. 299, § 2; amended L.1967, c. 680, § 86, eff. Sept. 1, 1967.

APPENDIX F

Labor Law of the State of New York, Section 808, 30 McKinney's Consolidated Laws of New York, p. 416

§ 808. Contempt of injunction order to be tried by jury

1. Notwithstanding any other provision of law, no person shall be punished either by fine or imprisonment for any alleged contempt arising out of any failure or refusal to obey any mandate of the court contained in or incidental to an injunction order granted by said court in any case involving or growing out of a labor dispute except after a trial by jury to which the defendant shall be entitled as a matter of right; provided, however, that this section shall not apply to any alleged contempt of such an injunction order committed in the presence of the court.

2. As used in subdivision one of this section:

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation; or who are employees of one employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is between one or more employers or associations of employers and one or more employees or associations of employees; between one or more employers or associations of employers and one or more employers or associations of employers; or between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing inter-

ests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined);

(b) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee;

(c) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it and if he or it is engaged in the industry, trade, craft, or occupation in which such dispute occurs, or is a member, officer or agent of any association of employers or employees engaged in such industry, trade, craft, or occupation. Added L.1962, c. 310, § 258, eff. Sept. 1, 1963.

(39530) SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1969

No. 552

ALBERT SHANKER, individually and as President of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO and UNITED FEDERATION OF TEACHERS, LOCAL 2, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Appellants,

against

J. LEE RANKIN, Corporation Counsel of The City of New York, on behalf of The Board of Education of The City of New York,

Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS APPEAL

J. LEE RANKIN,
Corporation Counsel
of the City of New York,
Counsel for Appellee,
Municipal Building,
New York, New York 10007.

FREDERIC S. NATHAN,
STANLEY BUCHSBAUM,
WILLIAM M. MURPHY,
of Counsel.

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IN THE

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No. 552

ALBERT SHANKER, individually and as President of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO and UNITED FEDERATION OF TEACHERS, LOCAL 2, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Appellants,

against

J. LEE RANKIN, Corporation Counsel of The City of New York, on behalf of The Board of Education of The City of New York,

Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS APPEAL

Appellee moves pursuant to Rule 16 of the Rules of the Supreme Court of the United States to dismiss the appeal on the grounds that no substantial federal question is presented by this appeal.

Statement of the Case

Appellant, United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (UFT), and its President, the appellant, Albert Shanker, were found guilty of criminal contempt of court for wilfully and deliberately disobeying court orders enjoining them from engaging in a strike against the Board of Education of the City of New York.

Appellants' sole contention here is that the denial of their request for a jury trial violated the equal protection and due process clauses of the Fourteenth Amendment.

The strike began on September 9, 1968, in violation of New York law prohibiting strikes by public employees (N.Y. Civil Service Law, §210[1]). The UFT and most of its more than 55,000 members remained on strike from September 9 to September 11, from September 13 until September 27, and from October 11 until November 18, 1968. The result was a virtually complete shutdown of the New York City public school system and the loss of 35 school days to more than one million pupils.

The day the strike began appellee commenced an action for an injunction and the same day obtained a temporary restraining order forbidding strike action. The temporary restraining order was continued in effect by the New York Supreme Court until superseded on September 30, 1968, by a preliminary injunction containing identical restraining provisions.

At the commencement of the hearing on appellee's motion to punish for criminal contempt, appellants demanded a jury both as a matter of state law and under the federal Constitution. The motion for a jury trial was denied by the trial court (Juris. App. D, pp. 53a-62a).* Appeals from this intermediate determination were taken to the Appellate Division of the New York Supreme Court which affirmed without opinion (30 AD 2d 956, 294 N.Y.S. 2d 680) and to the Court of Appeals, which rejected both the state and federal claims (Juris. App. C, pp. 31a-51a, 23 N.Y. 2d 111, 295 N.Y.S. 2d 625). An application for a stay of trial pending an appeal to this Court was denied by the full bench after a hearing before Mr. Justice Harlan (393 U.S. 930).

The trial then began without a jury on November 13, 1968 with the strike still in progress. Both appellants were convicted (Juris. App. B, pp. 3a-30a). Shanker was sentenced to fifteen days imprisonment and a $250 fine; UFT was fined $220,000. Their convictions were affirmed by the Appellate Division (31 A.D. 2nd 1010, 299 N.Y.S. 2d 374 [per curiam]) and the Court of Appeals (Juris. App. A, pp. 1a-2a, 25 N.Y. 2d 780, N.Y.S. 2d).

* Juris. refers to Appellants' Jurisdictional Statement

POINT I

With a single exception, New York tries all categories of criminal contempt cases without a jury. To remedy abuses which arose in criminal contempt proceedings brought in cases arising out of private labor disputes, it provided for jury trials in such cases only. The absence of such a jury trial exception for cases arising out of strikes by governmental employees does not deny equal protection where there has been no history of abuse and where the Legislature guarantees private employees the right to strike, while absolutely barring strikes by public employees.

We note first the general rules that the burden of establishing the unconstitutionality of a statute rests on the party who assails it and that a "statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." *Metropolitan Co.* v. *Brownell*, 294 U.S. 580, 584 (1935).

Basically, appellants' contention is that violations of injunctions against strikes by public employees are no different from violations of the more limited injunctions against activities relating to strikes by private employees and that to provide jury trials for the latter and not for the former violates the constitutional mandate. The similarity, however, is superficial for behind the different treatment lies both a history of abuse in the private arena that had no counterpart in the public sector and a wholly different legislative treatment of strikes in the private and public sectors.

(1)

Under the New York Constitution there is no requirement that there be a trial by jury in criminal contempt proceedings. *People ex rel. Frank v. McCann*, 253 N.Y. 221 (1930). See *Rutherford v. Holmes*, 5 Hun 317, 319 (1875). Section 750, subd. A, par. 3, of the New York Judiciary Law provides that a court of record has power to punish for criminal contempt a person guilty of wilful disobedience of its lawful mandate. This provision for trial of a criminal contempt by the court has been in the statutory law of New York since 1829. See Nelles, *Summary Power to Punish for Contempt*, 31 Col. Law Rev. 956, 967 (1931); 13TH ANNUAL REPORT OF THE NEW YORK JUDICIAL COUNCIL at p. 253. See, as to earlier periods, *United States v. Barnett*, 376 U.S. 681, 714-716 (1964).

The maximum jail sentence for criminal contempt has remained at thirty days since 1829. Criminal contempt therefore has always been a petty offense in New York so that there is no federal-constitutional right to a jury trial. *Duke v. Taylor Instrument Co.*, 391 U.S. 216, 219-20 (1968).

We have found no case or statute requiring a trial by jury in a criminal contempt proceeding in New York until the enactment of the Little Norris-LaGuardia Act in 1935.* This legislation was adopted shortly after the enactment of the federal Norris-LaGuardia Act** and was modelled on the federal law. Like the federal law, it provides for trials by jury in contempt proceedings arising out of labor

* New York Laws 1935, chapters 208, 209, 477. Civil Practice Act, §882-a, enacted by chapter 208 is now to be found in New York Labor Law, §808. Civil Practice Act §882-b, enacted by chapter 477 is now to be found in New York Labor Law, §807.

** 47 U.S. Stat. 70; 29 U.S.C. §§101-115; 18 U.S.C. §3692.

lic employees and provided punishment for violation of the prohibition. It contained no provision with regard to injunctions or contempt of court orders.

In 1967, the Condon-Wadlin Law was replaced by the Taylor Act (New York Laws 1967, ch. 392). This was a more elaborate attempt to deal with public employee labor relations. It provided methods by which public employees and their unions could present their grievances and bargain collectively. At the same time it continued the prohibition against strikes by public employees.

The Taylor Act made only two changes which affected previous law as to contempt. Civil Service Law §211 mandated the chief legal officer of the affected government to apply forthwith for an injunction against an actual or threatened strike and to apply forthwith to punish violation of the injunctive order under the criminal contempt statute. Judiciary Law §751 was amended by adding a new subdivision (2) which provided additional financial penalties applicable only to public employee unions and set forth factors to be considered in fixing the penalties.

The twenty-two years since New York State first began to legislate on the subject of public employee strikes has seen a number of injunction orders issued to restrain such strikes. A not insignificant number of officials of public employee unions have been tried for contempt of such injunctions during this period. See, e.g., *New York City Tr. Auth.* v. *Loos*, New York Law Journal [hereinafter NYLJ], December 20, 1956, p. 3, col. 7 (respondent Loos and others convicted); *New York City Tr. Auth.* v. *Loos*, 9 Misc. 2d 492 (1957) (respondent Zelano acquitted); *City of New York* v.

Sobel, NYLJ, February 5, 1965, p. 16, col. 2, rev'd, 23 AD 2d 35 (summary finding of contempt reversed); *Bd. of Educ. v. Shanker*, NYLJ, October 5, 1967, p. 13, col. 8, 29 A D 2d 634 (contempt conviction affirmed); *State of New York v. Fuller*, 31 A D 2d 71 (1968) (contempt conviction affirmed). We are aware of no claim of abuses in the granting of such injunctions or in the ensuing contempt trials.

No clamor has arisen for extending the Little Norris-LaGuardia Act to public employee labor disputes. Although the Legislature amended Condon-Wadlin repeatedly and has already amended the Taylor Act, it has not attempted to restrict the Court's power to issue injunctions or to try charges of criminal contempt without a jury. Prior to the passage of the Taylor Act, there was a complete review of the entire problem of public employee labor relations (see Final Report [March 31, 1966] of the Committee on Public Employee Relations). If there were any evidence of abuse requiring the extension of the jury trial to public employees to protect them from judicial bias, there would at least have been some reference to the problem in the Taylor Committee Report. More significantly, appellants offered no proof below and make no contention here that there has been any abuse in this or any other cases involving public employees.

There is a very practical reason why the abuses have not appeared in the public sector. In the private sector, the right to strike is guaranteed by statute (Labor Law §§ 703, 713). It is only certain associated activities which can be enjoined such as coercive picketing or illegal boycotts. Therefore, the questions which arise in the private area can be complicated factual ones, and this complexity creates opportunities in which prejudice can operate. By

contrast, in the public sector, there is no such thing as a "legal strike." Consequently, in the contempt proceeding the only real issue is whether there is a strike. Judicial hostility would be difficult to conceal when the question to be decided is so simple.* Moreover, in the injunction proceeding any judicial prejudice against the right to strike can cause no abuse since any such "bias" would merely reflect state law.

(2)

The equal protection clause permits a State to aim remedial legislation at an area where the evil appears without requiring it to reach similar areas where the evil is not so pronounced or does not even exist. As was pointed out by Mr. Justice Holmes in *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144 (1914):

> "A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class."

The Little Norris-LaGuardia Act was remedial legislation. Insofar as it dealt with contempt proceedings, it went no further than the narrow category in which the abuses had been found. These abuses had not arisen with respect

* Difficult questions can arise, as they did below, on the issue of the union's punishment under amended Judiciary Law §751(2) but punishment is determined by the court in all cases. In this connection, it is apparent from the Trial Court's opinion (Juris., App. B), that there was no serious question of appellants' guilt here. Rather, they sought to show that the strike had been provoked. Such evidence was relevant on the issue of punishment only (Judiciary Law §751(2)(a). Indeed, it is difficult to see how appellants could have been prejudiced by the lack of a jury trial on the issue of their guilt.

to public employees, or alimony debtors or any of the hundreds of other categories of actual or potential contemnors. There was therefore no reason for extending this special provision to these other categories. The Legislature was attempting to eliminate an evil, and in so doing, it limited the remedy to the area in which the evil existed.

Certainly, no case can be found which would support the proposition that New York violated the constitutional prescription against invidious classifications when it did not apply the remedy to an area in which the evil had not been shown or even alleged to exist. The law is wholly otherwise.

Even if this were a situation where the Legislature has refused to extend a remedy to apply to a similar evil, appellants would have no complaint. "Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the Legislature may think. * * * Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955); see also *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88 (1945); *A.F. of L.* v. *American Sash Co.*, 335 U. S. 538, 541-42 (1949); *Railway Express* v. *New York*, 336 U. S. 106, 110 (1949).

The appellants' argument comes down to a claim that, if a jury trial is provided in contempt proceedings for one category of labor disputes, it must also be provided for all labor disputes. Equal protection is not so simplistic a doctrine. Appellants' thesis would confront legislatures with endless dilemmas. If all who come within a general

category must be treated with mathematical sameness without the possibility of carving out lesser categories, legislation would have to go beyond the evil sought to be remedied. In this case, the Legislature would have the choice of extending the jury trial and other provisions of the Little Norris-LaGuardia Act to many persons beyond the remedial purpose of the statute or of abandoning the remedial legislation altogether. Confronted with the requirement for such legislative over-kill, a landmark statute might never have been enacted or sustained—a result hardly beneficial to or even desired by public employees.

(3)

Another valid reason for the Legislature's classification is that the grant of a jury trial would undermine the State's policy against strikes by public employees. This is a policy which has no counterpart in the private sector where the right to strike is established by law.

To make its ban on strikes by public employees effective, the Legislature mandated that the chief legal officer "shall forthwith" seek injunctive relief against actual or threatened strikes and, in the event of a violation of the court's order, "shall forthwith" initiate criminal contempt proceedings. (Civil Service Law, §211). Speedy action against actual or potential strikes is thus required by statute.

With such a clear expression of the Legislature's desire for prompt action it is not irrational to conclude that a jury trial would be inappropriate in contempt proceedings involving public employees. A jury trial might prevent a determination of the contempt issue and the application of

the jail sanction. Such a result would render inoperative two of the mechanisms by which the Legislature intended to force speedy termination of public employee strikes and the restoration of government services.

Many strikes by public employees, because they may result in public inconvenience or substantial danger, receive wide publicity and some, like the instant one, so pervade and polarize the community that the selection of an impartial jury would be difficult. In no other situation is a jury called upon to deliberate on guilt or innocence while the alleged criminal acts are still being committed by the defendants on trial. The relatively simple issue of whether a court order has been violated would tend to be obscured by the juror's views as to (1) the wisdom of the Legislature's determination that public employee strikes are illegal *per se* (2) the justice of the strikers' demands (3) the personal impact of the work stoppage on the juror, and (4) the possible financial impact on the juror of the attainment of the strikers' demands.

Aside from the problem of obtaining an impartial jury, there is the problem of delay. The *voir dire*, the opening and closing statements of counsel, the charge and the deliberation of the jury are all potent sources of delay. Moreover, those strikes, such as the one at bar, which arouse strong emotions and receive extensive coverage by the press may lead to applications for a continuance and a change of venue. These motions will have to be heard and decided with attendant consumption of time. The granting of either application would further frustrate the legislative purpose of a speedy determination. A change of venue would also remove both the government officials and the

union leaders further from the bargaining table and from the place where their efforts are required to cope with the effects of the strike.

Finally, a jury trial carries with it a greater likelihood of a mistrial and the possibility of a disagreement.

While these delays continue the union is able to continue to violate the court's mandate thereby frustrating the state's policy. The injunction would lose both its deterrent and remedial effect.

As Chief Judge Fuld noted in his opinion for the Court of Appeals, this need for quick action "to deter the continuance of paralyzing public strikes by visiting punishment on the offenders" fully sustains the validity of the classification made by the New York Legislature (23 N Y 2d at p. 117).

Appellants claim that the jail sanctions have proved ineffective in terminating the strikes (Juris., pp. 12-13) and for that reason contend the classification is improper. The argument ignores proper principles of constitutional adjudication. "The courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators." *Metropolitan Casualty Insurance Co.* v. *Brownell,* 294 U.S. 580, 584 (1935).

The fact that the sanctions may not have been as effective as the Legislature might have desired is not conclusive. There is nothing in the record to show how many public em-

ployee strikes were foreshortened or wholly prevented by the enactment of the Taylor Law, the invocation of its procedures, or the application of its sanctions. Nor would it be practicable to determine with accuracy how many unions may in the past have been or may in the future be deterred from acting illegally. "[T]his court ought to be very slow to declare that the state legislature was wrong in its facts" (*Patsone* v. *Pennsylvania, supra,* 232 U.S. at p. 142).

(4)

Appellants argue that to deny a jury trial to non-critical public employees and to grant one to private employees performing essential services is an irrational discrimination (Juris., p. 18). This really is an attack on drawing distinctions between public and private employees generally. Essentially, it challenges the right of the Legislature to bar all strikes by public employees, while permitting strikes in the private sector of the economy including strikes critical to the public health and safety. But this classification with respect to the right to strike—which appellants do not challenge—rests on the soundest of bases (*City of New York* v. *De Lury,* 23 N Y 2d 175, 183-87 [1968], app. dismissed 394 U.S. 455, mot. for reargument pending) and so long as this classification is constitutionally proper, then what is to appellant an irrational distinction is in fact a most reasonable one. For to grant a jury trial would impair the effectiveness of the strike ban in the public area. Thus, the refusal to do so does not offend the equal protection safeguard since the absence of a jury trial is not "wholly irrelevant to the achievement of the State's objective" (*McGowan* v. *Maryland,* 366 U. S. 420, 425 (1961).

POINT II

New York's failure to grant a jury trial to non-critical governmental employees involved in contempt proceedings is not overly broad because: (1) the denial serves to strengthen New York's strike ban and (2) the exception made for private employees from New York's general procedure, which does not provide a jury in contempt proceedings, was done to cure abuses that did not exist in the public sector.

(1)

Appellants' due process claim is that "the statutes as so construed are over-broad and not limited to the area of permissible application" (Juris., p. 5) in that a jury trial is denied all public employees, not just ones whose work is just critical. Appellants carefully avoid saying exactly which statutes are over-broad. The Little Norris-LaGuardia Act, which does not even mention public employees, is not broad at all. That law only carves out an exception to the general rule of court trials by providing a jury trial for those employees involved in private labor disputes. Actually, what appellants are saying is not that the Little Norris-LaGuardia Act is over-broad, but that it is not broad enough because it does not cover non-critical public employees. At this point, the specious nature of the argument becomes clear.

Public employees never were granted a jury trial because the abuses in the private sector which made it necessary were not found in the public sector. If the rationale of the Norris-LaGuardia Acts had been to exclude public employees because the critical nature of their work required

prompt action to end the strike, then appellants might have an argument that the statute goes too far. But the statute was passed to protect the right to strike in the private sector, a policy which does not obtain in the public sector *whether the work is critical or not.* The statute is thus not overly broad, but in terms of its purpose, is precisely commensurate with the evils against which protection was sought.

(2)

New York does not violate due process because it denies a jury trial to non-essential government employees as well as critical government employees. As a matter of state policy, New York has determined to forbid strikes by all governmental employees and that policy applies whether their work is critical or not. No doubt the need to end strikes is most pressing where the workers are directly affecting the public health and safety. Nevertheless, the Legislature has determined that strikes by all public employees are against public policy regardless of the nature of the work. Even if the test were whether the work is essential to the public health and safety, it can hardly be said that the education and supervision of large numbers of school children is not essential.

While it is possible to imagine that there may be some public employees whose work is so insignificant that the delay which a jury trial would impose would have no substantial impact on the public, still, any delay is inconsistent with the state's desire that strikes against the government not be tolerated even briefly.

(3)

Appellants assert that this case involves the question of the constitutional rights of public employees and that somehow the Taylor Act's denial of the jury trial entails the loss of legal rights they would otherwise have. They rely on such cases as *Gardner* v. *Broderick*, 392 U. S. 273 (1968) and *Pickering* v. *Board of Education*, 391 U. S. 563 (1968). These cases involve situations where it was argued that the states could require that public employees accept certain limitations on their constitutional rights such as the privilege against self-incrimination or freedom of speech. Here, however, because of the petty nature of the penalty, there is no constitutional right to a jury trial, and appellants' claim that they are denied a constitutional right is misleading. Private employees are entitled to a jury trial for the petty offense by statute, not by constitutional mandate. The only question presented here is whether the distinction made by New York law is so arbitrary and capricious as to deny equal protection. We believe we have shown that is is not.

The due process argument adds nothing to the equal protection argument. Both must be rejected.

Conclusion

The appeal from the order of the Court of Appeals of the State of New York should be dismissed.

Respectfully submitted,

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Corporation Counsel
of the City of New York,
Counsel for Appellee.

Frederic S. Nathan,
Stanley Buchsbaum,
William M. Murphy,
of Counsel.

October 9, 1969

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 552

ALBERT SHANKER, individually and as President of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO and UNITED FEDERATION OF TEACHERS, LOCAL 2, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Appellants,

—against—

J. LEE RANKIN, Corporation Counsel of The City of New York, on behalf of The Board of Education of The City of New York,

Appellee.

REPLY BRIEF ON BEHALF OF APPELLANTS

RALPH P. KATZ
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Attorneys for Appellants

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REPLY BRIEF ON BEHALF OF APPELLANTS

Appellee's brief, we respectfully suggest, goes far to support the appellants' statement that this Court has jurisdiction of an appeal involving a substantial Federal question. Appellee nowhere contends that the issues are not of a substantial constitutional nature. Appellee nowhere contends that the issues are not of Nation-wide importance to millions of public employees and their families. Nowhere does appellee contend that the issues raised are not of substantial interest to local and State governments throughout the Nation. Appellee nowhere contends that the issues do not arise in a growing and changing area of the law

wherein this Court, on a case by case basis, is determining the respective rights and obligations of public employees and public employers.

Appellee simply uses this preliminary stage of the proceeding to present its arguments on the merits. To this appellants might only state: (1) that the office of its Jurisdictional Statement was to demonstrate to this Court that it does indeed have jurisdiction of this appeal, not to convince the Court of the rectitude of its position; and (2) that the 4-3 division of the New York State Court of Appeals and the opinions of the judges of that Court by themselves demonstrate sufficient merit in appellants' position to entitle appellants to a hearing by this Court on the merits.

Appellants do not intend to do more in this reply than support their position with respect to this Court's jurisdiction. They will reply to appellee's arguments on the merits at the appropriate time.

There are, however, two statements presented in appellee's brief which do warrant reply at this stage of the proceeding.

At page 9 appellee writes:

> "More significantly, appellants offered no proof below and make no contention here that there has been any abuse in this or any other cases involving public employees."

Appellants did not argue abuse in this case because their constitutional rights to equal protection of the laws and due process do not depend on the manner in which the judge in

this particular case acted. Now that appellee has raised the issue, however, appellants forthrightly do state that there was massive abuse of their rights in this case. This can be shown directly from the actual transcript of the record.

The trial judge in this case had clearly predetermined the appellants' guilt of criminal contempt fully one month before the non-jury criminal contempt trial even began—that is, before any evidence in the criminal contempt proceeding had been introduced.

The trial commenced on November 13, 1968. On October 11, 1968 the trial judge said from the bench in open court:

> ". . . you have deliberately, that is, the defendants, defied the lawful mandates of the court." (T. 571, Reply Appendix A, p. 9.)

The above statement was made by the trial judge whose judicial task was to determine the issues of fact as to whether the appellants had committed "wilful disobedience to its [the court's] lawful mandate." Judiciary Law of the State of New York, Sec. 750(3).

The appellants' demand for a trial by jury was not a mere theoretical exercise of a constitutional right to equal protection and due process. It was their only hope for an unbiased trial. (See T. 567-579, Reply App. A, pp. 7-14 for the trial judge's full statement and the colloquy that followed.)

The judge, who formerly had been associated with the plaintiff as one of the attorneys in the Office of the Corporation Counsel, was respectfully asked to disqualify himself. He refused to do so, stating:

> "I have practiced law for forty years. Yes, I was a member of the Law Department. I have been in government for over 34 years. That doesn't disqualify me. It probably makes me more qualified to deal with this question. I can be objective." (Complete motion and ruling at T. 50-51; Reply App. B, p. 15.)

A later motion to have the judge disqualify himself was also rejected. (T. 212, Reply App. B, p. 16.)

The former association of the judge to the plaintiff was particularly important in this case. In order not to overburden the reply brief with excessive detail, appellants simply state that three separate and distinct issues were presented which directly involved the Office of the Corporation Counsel of the City of New York: standing to sue as a plaintiff (T. 63, Reply App. B, p. 17); propriety of acting as attorney when the Board of Education had its own general counsel and legal staff (T. 67, Reply App. B, p. 17); and actual bias and unequal application of the Corporation Counsel's powers of prosecution (T. 1809-1810, 1822, Reply App. B, pp. 18-19).

This case was brought by the Corporation Counsel of the City of New York, representing himself as plaintiff. He styled his papers as "on behalf of the Board of Education of the City of New York." Under questioning, however, the Corporation Counsel admitted that the Board of Education of the City of New York had never authorized the action. (T. 82-83, 96, Reply App. B, pp. 17-18.)

There was the most fundamental abuse of rights in this case. All the dangers to a fair determination in non-jury criminal contempt trials were present. In *Bloom* v. *Illinois*, 391 U.S. 194 (1968) the Court wrote at page 202:

> "Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power."

That observation is particularly applicable here. For in this case we have one branch of the government as plaintiff and prosecutor seeking to have the appellants found guilty of violating the order of another branch of the government, bringing their case before the very judge whose order they allege was wilfully disobeyed, and opposing the submission of issues of fact to a jury.

The abuses in this case are not unique. In another case involving public employees, *City of New York* v. *Social Service Employees Union,* NYLJ, February 5, 1965, p. 16, col. 2, rev'd sub nom. *SSEU* v. *Saypol,* 23 A D 2d 55 (1965), nineteen union leaders were actually compelled by the judge to testify against themselves and their unions under threat of additional contempt charges. In that case the contempt convictions were reversed, but only after nineteen persons had been imprisoned.

Only one other statement by appellee warrants reply at this stage of the proceedings. At p. 10 of its brief, he writes: "Consequently, in the contempt proceeding, the only real issue is whether there is a strike." That is inaccurate. In this case the primary factual issues are: (1) did appellants disobey the court's order; (2) was the appellants' conduct wilful? These are the questions which appellee seeks to keep away from jury determination.

CONCLUSION

A substantial Federal question is raised by this appeal. This Court should note jurisdiction so that the parties may present their full arguments on the merits toward the end that justice be done.

Respectfully submitted,

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APPENDICES

APPENDIX A

Excerpts From Transcript

[567] The Court: What I say now not only is in reply to the statements of all three gentlemen, counsel in this matter, but also to you, Mr. Shanker, and that is why I asked you to come here.

This Court was hopeful that this unfortunate situation would have been amicably settled by this time. It is regrettable that the situation has not been settled, and that you and the UFT saw fit to call this strike again.

Just so that the record will be quite clear about it and, perhaps, place this in perspective, because you should be slightly concerned, Mr. Shanker, on September 9, 1968, by order to show cause of this Court, there was served on you an order which provided, among other things—and I read from the order of that date—meanwhile and pending the hearing of this motion, the defendants and their respective officers, agents, members, representatives, servants, employees, and all persons whomsoever known or unknown, acting in their behalf or in concert with them [568] in any manner, or by any means, are hereby enjoined and stayed from

(a) Engaging in, causing, instigating, encouraging or continuing or lending support or assistance of any nature to any strike, concerted stoppage of work or slowdown in the performance of any duties of employment with the Board.

There are other restraints, and implementations of what I just read, generally speaking.

As a result of that order to show cause, there was a rather lengthy hearing before this Court, on the application for a preliminary injunction in this action, for a per-

manent injunction. This Court, I, signed an order on September 30, 1967, in which I said:

> "Ordered that the defendants, United Federation of Teachers, and Council of Supervisory Associations, and their respective officers"—that includes you, Mr. Shanker,—"agents, members, representatives, servants, employees, and all persons whomsoever known or unknown, acting in their behalf or in concert with them [569] in any manner or by any means, be and they hereby are enjoined and stayed from engaging in, causing, instigating, encouraging or condoning or lending support or assistance of any nature to any strike, concerted stoppage of work or slowdown in the performance of any duties of employment with the Board of Education of the City of New York."

This order was served, I assume, on your counsel, and you are aware of it. You were, thereafter served with an order to show cause signed in this court on September 13, to punish you for contempt of court for failing to obey the restraints contained in the order of September 9th.

In my opinion of September 30, upon which the order I just read was based, I said, among other things, "There is only one underlying principle that has concerned the Court in the consideration of this matter."

And I said this after repeating that I was mindful of the rights of all the parties, not [570] only those before the Court, but those who are not before the Court; and I went into some lengths to talk about the question of due process, job security, tenure, pensions, and all the collateral rights of the members of your association and your federation. I went on to say:

> "The paramount issue is the need for the children of this city to receive their education, which is vouchsafed to them by the constitution. Such need transcends the needs of the parties here involved, and such need must be concerned and dealt with in its application to the entire City of New York, and not just one area of the city."

I am glad to see that everybody has picked that up now, because I wrote that sometime ago.

There is no reason why 900 schools should be closed because of a dispute in one school.

This Court will not permit itself to be trifled with. The orders of this Court should be observed and obeyed. Defiance of lawful [571] orders of a court lead inevitably to the breakdown of law and order.

Transcending the importance of your violations of our statutes is the fact that you are doing so, and you have deliberately, that is, the defendants, defied the lawful mandates of the court.

The defendant union, powerful though it may be, is nevertheless, insufficiently powerful to disdain the law and the courts with impunity. Our existence as a free people is dependent on a healthy respect for law and order.

In this instance, the orders of this Court have been defied. I am going to suggest to you, Mr. Shanker, that you in your wisdom, in your authority, in your leadership—and I know that it takes two to make such bargain; and, perhaps in this instance, more than two—do whatever is required to call off this strike at the earliest possible time. I think it is imperative that the children, the parents of these children and, certainly the children and [572] parents

in communities outside of Ocean Hill-Brownsville, have the education to which they are entitled. There must be other ways of skinning this cat. We are ingenious to do a great many things, and we should be ingenious enough to do this. It serves no purpose whatever to take it out on the innocent. There will be no victors in this thing. Everybody is a loser. And this is one of the reasons I wanted this session this afternoon.

In less than five weeks we have had three work stoppages, three strikes in an area where we can't tolerate one. I am suggesting that you do everything in your power, because you do have a powerful union, and I have a great deal of respect for it. Certainly I respect the union. I always have. But, the rights of the people in this community must certainly be observed and well regarded.

I am going to advance the trial of this action to tomorrow afternoon at two o'clock.

So far as you, Mr. Frankle, are concerned; [573] I am not unmindful of your situation. There is no reason why you can't absent yourself for the time being, with Mr. Shanker being here. So far as Mr. Degnan is concerned, you can have him here on Wednesday. The Court can accommodate you so far as your prior engagement is concerned and I certainly want to. I practiced law long enough to know how imperative it is to accommodate one's self to such things.

I will set it down for two o'clock tomorrow, Mr. Katz. Your proceeding before this administrative agency that you called the Court's attention to commences at nine o'clock. If you are not finished by noon, I wish you would inform the hearing officer there, or the commissioner, if it is before a commission, that this Court takes precedence over an

administrative agency in this regard, and I am ordering you to go to hearing tomorrow.

Since this is a motion to punish for criminal contempt, I would desire that Mr. Shanker, as one of the defendants sought to be punished, be here in person, so there will be no question [574] about it, since it is a motion to punish for criminal contempt.

Is that acceptable to you, Mr. Nathan? Two o'clock tomorrow.

Mr. Nathan: Yes, it is.

The Court: I have a calendar in this court that I must dispose of.

Mr. Frankle, I think that I have made myself clear with you.

Mr. Frankle: Thank you.

The Court: Thank you.

The Court: And Mr. Katz?

Mr. Katz: Yes, your Honor.

May I say just one thing?

The Court: You certainly may.

Mr. Katz: I am disturbed by one comment you made, the statement that the orders of this Court have been defied. I think I quoted you accurately. I think those are the very words you used.

It concerns me because it is almost tantamount to a determination, prior to the hearing, as to whether there has been a contempt.

The Court: You see, Mr. Katz, unfortunately, the semantics of the situation must require that [575] I say what I said, because there has been a defiance, you see, of the order of September 9th, with the restraints in it; and, certainly my order of September 30th, in which I ordered the defendants that they be enjoined and stayed from strik-

ing. I say they have disobeyed, and they have defied these orders.

Now, then, you can't, under any stretch of the imagination, indicate that this Court has come to a conclusion with respect to the contempt motion. The contempt motion deals with punishment, which is separate and apart from the question of a disobedience or defiance of a Court's order.

I say, again, while the language may be the same, I use it in an entirely different context at this point. So, don't take offense at it, because I have not decided the contempt case, because I haven't yet decided the two procedural motions.

I must confess that in this case I have had everything thrown at me, as you know. First, [576] Mr. Shanker traversed service on him. After that was decided, then UFT indicated it traversed service on it.

After that had been made, and that will be decided at tomorrow's session, then I had thrown at me the question of a trial by jury. This must be a landmark decision for a trial court, at any rate, because it has never been before a trial court. And I have undertaken to treat with that, Mr. Katz, as I told you earlier, with all the sincerity and thoroughness that I can, as a lawyer—as a lawyer, I said—mindful of all the implications not only of the case itself, but all the authorities both in this case and in the Supreme Court of the United States.

Mr. Katz: Your Honor, I respectfully disagree with your statement in regard to the contempt. Contempt is not a question of punishment. That is a question which may be reached after a finding is made that there has been a defiance of the order—

The Court: Read the statute, Mr. Katz. The [577] statute says that punishment, you see, is accorded after there has been a wilful disobedience.

In this case, I say that Mr. Shanker disobeyed these orders.

Mr. Katz: That's my very complaint, your Honor. The evidence before you with respect to whether or not a preliminary injunction should be granted is not sufficient for you to reach, as a Judge, a conclusion and determination, both factually and legally, as to whether there has been a disobedience, in terms of contempt of these orders.

The Court: I didn't say, in terms of contempt. You, perhaps, weren't listening and you were, perhaps, anticipating something. I said that Mr. Shanker, and the other defendants in this action, disobeyed the order of Mr. Justice Frank, contained in the order to show cause dated September 9th; and, certainly, disobeyed my order of September 30th. That's all I said. I didn't say there was a contempt, and I didn't say there was a wilful disobedience of those orders. These [578] are matters that will come before me at the contempt hearing, which I have already set down for two o'clock tomorrow.

Mr. Katz: The reason I am so concerned is, you used the word "defied," and defied, it seems to me, connotes a wilfulness, connotes a conclusion that a supposed disobedience—

The Court: Let me put your mind at ease, I have reached no conclusion, and don't let's indulge in sophistry; don't let's deal in semantics. I have reached no conclusion, except one conclusion at this point, that the defendants in this proceeding have been enjoined by two orders of this Court from proceeding in striking; and despite those admoni-

tions, and despite the admonition I gave you to relay to Mr. Shanker on Friday, a strike was called for this morning.

These are the things that I say cause a defiance of the Court's orders.

Now, the question of contempt will be a matter I will have to decide after the hearing. Whether I do it alone, or whether I do it with a jury, will depend upon my opinion that you will [579] have by tomorrow.

* * * * *

APPENDIX B

Excerpts From Transcript

* * * * *

[50] Mr. Frankle: May I, your Honor, at this point, most respectfully submit to you, and by this I mean no disrespect to the Court nor to you, nor (sic) Honor. But in this particular proceeding the plaintiff is not the Board of Education. The plaintiff is a Corporation Counsel. And I am wondering, and I am going to ask your Honor, in fairness to all parties concerned, whether or not your Honor feels that by reason of his own background and his association with the Corporation Counsel's Office for all these years, whether or not in all fairness to the parties, perhaps it would be best—I respectfully submit that to your own discretion, your Honor—that you disqualify yourself.

The Court: Having failed in one respect, you seek another. I have practiced law for forty years. Yes, I was a member of the Law Department. I have been in government for over 34 years. That doesn't disqualify me. It probably makes me more [51] qualified to deal with this question. I can be objective. Perhaps a bit more objective than you can. And let me ask you this, sir. Are you familiar with Section 211 of the Taylor Act?

Mr. Frankle: I am, sir.

The Court: That Taylor Act gives the Corporation Counsel, in fact it mandates the Corporation Counsel, to start this proceeding, which he has done. The fact that I was a member of the Corporation Counsel's Office some twenty-odd years ago does not disqualify me, and your application is denied.

Now go on to your next application.

* * * * *

[212] Mr. Fleischman: I expect the Corporation Counsel to put a prima facie case in before I call the witnesses.

The Court: You prefer it that way?

Mr. Fleischman: Obviously. I am not going to offer evidence until I see what he has.

Mr. Nathan: I understood that your Honor directed these two gentlemen to be here today.

The Court: I did direct them, and if necessary, we are not going to play "footsie" here, I am not going to be part and parcel of any game of "footsie" here. If possible the Court will call him if you, Mr. Fleischman, don't want to call him. We know what this is about. This is no secret to anybody.

Mr. Frankle: May I take strong objection.

Mr. Fleischman: I renew the motion to disqualify yourself, your Honor.

* * * * *

[214] Mr. Fleischman: Your Honor, this is not an investigatory proceeding, this is an adversary proceeding and I don't think it is proper for the Court to act as a grand juror or act as a commissioner of one.

[215] The Court: Come, come, you know what I am talking about. I said to Mr. Nathan—

Mr. Fleischman: I surely do, your Honor.

The Court: —if he didn't want to call them, and if they are in court, the Court will call them, because the trial is a search for the truth and that is what I want, the truth, what are the facts. You say there is no stoppage. All right, we will recess now until 2 o'clock.

Mr. Fleischman: I don't think you ruled on my motion to have you disqualify yourself.

The Court: I already did it. I did, but you didn't hear it.

Mr. Fleischman: Thank you.

* * * * *

[63] Mr. Fleischman: At this time I move to dismiss the action on the grounds that this Court does not have jurisdiction and there are not facts set forth in the moving papers, the summons and complaint, which state a cause of action, or in order to give the Court jurisdiction. I base this motion on three separate points. The first point is that the Corporation Counsel of the City of New York has no authority to bring this action. . . .

. . . . . .

[67] I have here a directory of the Board of Education published by the Board of Education in May of this year and it lists Sidney P. Nadel as counsel.

Furthermore, in its table of organization it lists an Office of Legal Services. And I say that in view of the definition of Chief Legal Officer, the Corporation Counsel is not the Legal Officer who can bring this action either as plaintiff or on behalf of the Board of Education.

. . . . . .

[82] Mr. Fleischman: Your Honor, may I ask permission to ask Mr. Nathan a question in connection with this motion?

The Court: You may if it has relevancy.

Mr. Fleischman: Can he advise me whether he ever received or his office received a written communication from the Board of Education authorizing the corporation counsel to institute this action, this party plaintiff?

The Court: I don't think he has to answer it. I will leave it entirely up to his own judgment.

[83] Mr. Nathan: I don't want, your Honor, to become a witness in the case but if that is the only question, I would be happy to answer that I did not.

. . . . . .

[96] The Court: Can I ask counsel a question to assist the Court?

Last year you actually brought it as the Board of Education against Shanker, this year it is brought by J. Lee Rankin, on behalf of the Board of Education against Shanker. Why the distinction?

Mr. Fleischman: Your Honor, this year it is brought up by J. Lee Rankin, plaintiff.

The Court: I have read the caption, I am not going to get involved in technicalities. Why the distinction?

Mr. Nathan: I will advise the Court that the reason that was done was that the Board of Education had not authorized the bringing of this action at the time that it was brought or has it since to my knowledge. * * *

* * * * *

[809] Q. I know. Now, what are the facts that were missing, why did you differentiate that case from this case?

Mr. Nathan: Objection.

The Court: Objection sustained.

Q. What is your method of investigation of facts with respect to possible Taylor Act violations, Mr. Rankin?

Mr. Nathan: Objection, your Honor.

The Court: Objection sustained.

Mr. Katz: I was just interested in the general practice of the office to see whether it was applied equally in this case and in other cases, your Honor.

The Court: There is another way of proving it. If you are interested in proving discrimination here, you prove it properly, but not with this witness in direct examination. This is your witness.

Mr. Katz: Well, your Honor, it seems to me [1810] that I have a right to show that the Corporation Counsel, who you have indicated as an appropriate plaintiff to bring these actions, has acted in a discriminatory manner by asking questions of the very person who is involved.

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[1822] Mr. Katz: Your Honor, the purpose of this examination is quite evidence (sic) now. I am sure that Mr. Nathan has spoken with Mr. Rankin. We are trying to show an unequal application to (sic) the law to the constitutional deprivation of my clients' equal rights. And I think we are entitled to inquire as to how this office has operated in the past and what its standard operating procedure and regular office practice is, and I think these questions are perfectly appropriate to that issue.

The Court: Ask your next question, please. I sustained the objection.

Mr. Katz: May I just hear that, please?

(Last question read back by reporter.)

The Court: I sustained an objection to that question.

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SUPREME COURT OF THE UNITED STATES

October Term, 1969

SHANKER ET AL. *v.* RANKIN

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 552. Decided December 8, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted.